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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 1026

ARTANUM IRRIGATION DISTRICT, a corporation, and THE STATE OF WASHINGTON, et al.,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## CONTENTS


Pages

Opinions Below ..... 1

Jurisdiction ..... 3

Questions Presented ..... 3

Constitutional Provisions, Treaties, Statutes, Agreements ..... 5

Statement of the Case ..... 8

Reasons for Granting the Writ ..... 18

1. The erroneous construction by the Court of Appeals of the subject matter of the 1908 agreement, i. e., the "natural flow" of Ahtanum Creek, conflicts with several decisions of this Court employing the term "natural flow" in its commonly accepted usage, and with prior decisions by the Ninth Circuit and at least one other Circuit accurately construing the term. ..... 19

2. The decision of the Court of Appeals unnecessarily visits disaster upon a long-established irrigation economy, and the decision conflicts with equitable principles which this Court has followed in other water right cases in order to protect existing economies from destruction. ..... 20

3. The Supreme Court should exercise its supervisory powers because the Court of Appeals improperly rejected the concurrent findings of fact of a Special Master and a District Court, in contravention of Federal Rule 52(a) requiring the acceptance of such findings unless "clearly erroneous." ..... 24

4. The Court of Appeals based its opinion that under the 1908 Agreement all water for the north side users should be terminated during the critical latter half of the irrigation season,

Page

on an erroneous construction of the laws of Washington as to the rights which the 1908 Agreement afforded, in contradiction to the construction of those laws by the Supreme Court of the State of Washington. ..... 28

Conclusion ..... 34

## TABLE OF CASES

Arizona vs. California, et al, 373 U. S. 546, 563-64, 592-94 (1963) ..... 21

Benton vs. Johncox, 17 Wash. 277, 49 Pac. 495 ..... 27

Colorado vs. Kansas, 320 U. S. 383, 390 (1943) ..... 20

In re Ahtanum Creek, 139 Wash. 84, 245 Pac. 758 ..... 27, 31

Gila Valley Irr. Dist. vs. United States, 118 F. 2d 509 (1941) ..... 20

Longmire vs. Smith, 26 Wash. 439; 67 Pac. 246 ..... 32

Madson vs. Spokane Valley Land Co., 40 Wash. 414, 82 Pac. 718 ..... 32

Nebraska vs. Wyoming, 325 U. S. 589 (1945) 618, 621 ..... 20, 21

New Jersey vs. New York, 347 U. S. 995, 1000 (1954) ..... 20

New Watcom vs. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901) ..... 32

Still vs. Palouse Irrigation & Power Co., 64 Wash. 606, 117 Pac. 466 (1911) ..... 32

United States vs. Ahtanum Irrigation District, et al, 124 F. Supp. 818 (1954) ..... 2, 15

United States vs. Ahtanum Irrigation District, et al, 236 F. 2d 321 (1956) cert. den., 352 U. S. 988 (1956) ..... 2, 15, 29, 35

Page

United States vs. Ahtanum Irrigation District, et al, (R. 1091-1106) Unreported Printed in Appendix E, pages 139-159 ..... 2, 16, 24

United States vs. Ahtanum Irrigation District, et al, 330 F. 2d 897 (1964) Rehearing Denied, 338 F. 2d 307 (1964) ..... 2, 3, 17, 24, 29

United States vs. Tilley, 124 F. 2d 850 (1941) cert. den. 316 U. S. 691 (1942) ..... 20

United States vs. U. S. Gypsum Co., 333 U. S. 364, 394-95 (1948) ..... 28

United States vs. Yellow Cab Co., 338 U. S. 338, 341-342 (1949) ..... 28

Wyoming vs. Colorado, 259 U. S. 419, 467, 470, 471 (1912) ..... 20

STATUTES

Act of February 8 1887, Section 7, 24 Stat. 390, 25 U. S. C., Sec. 381 (1958) ..... 6

Federal Rules of Civil Procedure, Rule 52(a) Rule 53(e) ..... 5, 24, 27

R. C. W. 90.03.010 ..... 6

R. C. W. 90.03.040 ..... 7

R. C. W. 90.03.110 ..... 7

R. C. W. 90.03.240 ..... 7

Rev. Stat., Sec. 463 (1875), 25 U. S. C., Sec. 2 (1958) ..... 6

Session Laws of Washington Territory, 1873, page 520 ..... 7

12 Stat. 951 ..... 5

4 U. S. C., Sec. 485 (1958) ..... 5

28 U. S. C., Sec. 1254(1) ..... 3

28 U. S. C., Sec. 1345 ..... 3

Page

CONSTITUTIONS

U. S. Constitution, Article 1, Sec. 8, Clause 3 ..... 5

TREATIES AND AGREEMENTS

Treaty of June 9, 1855, between U. S. A. and Yakima Tribe of Indians ..... 5, 8

Agreement May 9, 1908, between U. S. A. and Ahtanum water users
3, 7, 12, 13, 19, 21, 23, 24, 29, 30, 31

MISCELLANEOUS REFERENCES

Pretrial Order on the Merits ..... 25, 26

Supplement to Petition for Rehearing ..... 26

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UNITED STATES OF AMERICA,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered March 18, 1964, and printed in Appendix K hereto, pp. 244-246. Petition for rehearing was denied November 2, 1964, the printed opinion appearing in Appendix J hereto, pp. 241-243.

## CITATIONS TO OPINIONS BELOW

This case was brought by the United States, as trustee for the Yakima Indian Tribe, in the United States District Court for the Eastern District of Washington, to quiet title to that tribe to certain designated

flows of water, including the entire flow of Ahtanum Creek during the months of July, August and September of each year. The court rendered an opinion, *United States v. Ahtanum Irrigation District, et al, 124 F. Supp. 818 (1954)*, and judgment of dismissal, from which the United States appealed.

The first opinion of the Court of Appeals for the Ninth Circuit, *United States of America vs. Ahtanum Irrigation District, et al*, reported *236 F. 2d 321 (C. A. 9, (1956) cert. den. 352 U. S. 988 (1956)*, printed in Appendix C hereto, pp. 25-74, remanded the case to the District Court for further hearings.

The final report of the Special Master appointed by the District Court to hear the case (R. 538-583) is unreported and is printed in Appendix D hereto, pp. 75-138.

The opinion of the District Court (R. 1091-1106) is unreported and is printed in Appendix E hereto, pp. 139-159.

The second opinion of the United States Court of Appeals for the Ninth Circuit, is reported in *330 F. 2d 897 (C. A. 9, 1964)* and printed in Appendix I hereto, pp. 190-240.

The opinion of the United States Court of Appeals for the Ninth Circuit on petition for rehearing is re-

ported in *338 F. 2d 307 (C. A. 9, 1964)* and printed in Appendix J hereto, pp. 241-243.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

The jurisdiction of the District Court was invoked by the United States under 28 U. S. C. §1345.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered March 18, 1964. A timely petition for rehearing was filed, and was denied on November 2, 1964. On January 12, 1965, Associate Justice W. O. Douglas of this Court signed an order providing that

> "The time for filing petition for writ of certiorari in the above entitled cause be and the same is hereby extended to and including April 1, 1965."

## QUESTIONS PRESENTED

In 1908, the United States through the Secretary of the Interior, acting on behalf of the Yakima Indians, and a group of pioneer settlers acting collectively, entered into an agreement in settlement of a controversy over their respective rights to the waters of Ahtanum Creek in the State of Washington, by which the parties agreed to limit their respective rights as follows:

> "ARTICLE 1. The party of the first part [United States] agrees to limit and define its claim to the

> waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part [Pioneer settlers] agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named." (Bracketed designations added.)

The questions presented are:

(1) Whether the Court of Appeals erred in construing the 1908 agreement to impliedly terminate the rights of the water users on the north side of Ahtanum Creek in the middle of the irrigation season, so as to award the entire natural flow of the stream to the Indians from July 10 for the remainder of the season, thus substantially destroying a long-established economy dependent, before 1908 and during the half century since that date, on irrigation from Ahtanum Creek during the summer months.

(2) Whether (if the duration of the summer flow of the stream prior to the 1908 agreement is relevant at all) the Court of Appeals erred in rejecting the concurrent findings of the Special Master and the District Court that there was natural flow available for irrigation in and prior to 1908 which was in fact diverted and used by the north side irrigators subsequent to July 10 and throughout each irrigation season, said rejection

being in contravention of the mandate of Federal Rules 52(a) and 53(e) (2) that such findings are to be accepted unless "clearly erroneous."

(3) Whether the Court of Appeals erred in construing the laws of the State of Washington (in contradiction of the Supreme Court of that State) to the effect that an appropriation of the natural flow of the stream is "measured by time," and thus ceases to have any effect at all (irrespective of its priority date) during the summer months when the stream flow is reduced but still available for diversion.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND AGREEMENTS INVOLVED

Article 1, Section 8, Clause 3 to the Constitution of the United States of America, reads in part as follows:

> "The Congress shall have power . . .
> (Cl: 3) "To regulate commerce with foreign Nations, and among the several States and with the Indian Tribes; . . . "

The Treaty of June 9, 1855, between the United States of America and the Yakima Tribe of Indians [1] is printed as Appendix A hereto, pp. 5-16.

4 U. S. C. §485 (1958) provides:

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[1] 12 Stat. 951.

"DUTIES OF SECRETARY. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

"First. The public lands, including mines.

"Second. The Indians . . . "

Rev. Stat. §463 (1875), 25 U. S. C. §2 (1958), provides:

"Section 2. Duties of Commissioner. The Commissioner of Indian Affairs shall, under the direction of the Secretary of Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations."

Section 7 of the Act of February 8, 1887, 24 Stat. 390, 25 U. S. C. §381 (1958), provides:

"In cases where the use of water for irrigation is necessary to render the lands within any Indian Reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

The Court of Appeals considered a statute of the State of Washington dealing with water rights, R. C. W. 90.03.010, which provides:

"APPROPRIATION OF WATER RIGHTS — EXISTING RIGHTS PRESERVED. The power of

> the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall however, be subject to condemnation as provided in RCW 90.03.040, and the amount and priority thereof may be determined by the procedure set out in RCW 90.03.110 through 90.03.240."

An Agreement of May 9, 1908,[2] entered into between the United States of America and the Ahtanum water users on the north side, is before the court for interpretation. The Agreement appears as Appendix B hereto, pp. 17-24.

Section 1, Session Laws of 1873, Washington Territory, page 520, is also involved and provides:

> "Be it enacted by the Legislative Assembly of the Territory of Washington, that any person or persons, corporation or company who may have or hold a title or possessory right or title to any agricultural lands within the limits of Yakima County, Washington Territory, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said County for the purpose of irrigation

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[2] Defendants' Exhibit 116, R. 11690.

and making said land valuable for agricultural purposes to the full extent of the soil thereof."

## STATEMENT OF THE CASE

The decision below would result in drying up a valley in the State of Washington that has been irrigated for over 100 years.

It does so by directing that diversions by north side users cease July 10 each year, at the onset of the driest part of the year, and that the Indians on the south side shall have the entire flow of the stream thereafter during the remainder of the irrigating season.

Ahtanum Creek, on which this valley is dependent, arises on the eastern slope of the Cascade Mountains and flows easterly through the valley, emptying into the Yakima River about four miles south of the City of Yakima, Washington.

The Ahtanum Valley is the cradle of irrigation in the State of Washington. Water was first turned out of Ahtanum Creek in 1847 by the Catholic Mission located on the north side of the creek. On June 9, 1855, a Treaty [3] was entered into between the United States of America and the Yakima Tribe of Indians, which described the boundaries of the Yakima Indian Reservation reserved to the Yakima Indian Tribe. The north boundary of the Reservation was described in part as:

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[3] Appendix A, page 5.

"Commencing on the Yakima River, at the mouth of Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary . . . "

Irrigation progressed upon both sides of the stream for a period of approximately 50 years following the Treaty, when dissension arose as to the division of the water between the north side water users and the Indian Reservation to the south.[4] On August 18, 1906, one David Munn, a north side user, as plaintiff, filed in the Superior Court of Yakima County, Washington, a complaint against W. H. Redman and others[5] alleging that the defendants named were wrongfully diverting water from Ahtanum Creek and prayed for an injunction against them. The United States Attorney at Spokane, Washington, appeared for Redman privately with the approval of the Attorney General. The filing of this suit led to a considerable volume of correspondence between the United States Attorney and the Attorney General and between the Secretary of the Interior and officials of the Indian Irrigation Service. Plaintiff's counsel offered to dismiss the case if the United States would file a bill in equity to determine conflicting claims to

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[4] The small portion of the Yakima Indian Reservation served by Ahtanum Creek is a narrow strip of land lying on the north slope of Ahtanum Ridge between Ahtanum Creek on the north and Ahtanum Ridge on the south.

[5] Redman was an Indian Irrigation Service Engineer.

the waters of Ahtanum Creek. Although such a bill was prepared by the United States Attorney and approved by the Attorney General, it was not filed. [6]

In the latter part of the summer of 1907, at about the time the Government determined not to file the bill in equity, the Secretary of the Interior, James R. Garfield, made a trip to Yakima, conferred with officials of the Indian Service and the United States Attorney's Office, and also met with the owners of land on the north side of Ahtanum Creek. [7] The Secretary of the Interior expressed the opinion that the situation called for a settlement by agreement rather than by litigation, [8] and directed W. H. Code, Chief Engineer of the Indian Irrigation Service, to make field surveys. He did so, and submitted a comprehensive report to Secretary Garfield October 17, 1907. [9] The report indicated that the irrigated acreage of Indian land south of the creek was 1500 acres (this was about 21% of the total area irrigated), and that the non-reservation irrigated acreage north of the creek was 5500 acres, (*i. e.*, about 79%).

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[6] Appendix C, pages 37-40.

[7] Testimony of John H. Lynch, Defendants' Exhibit 122-A, pages 547-548.

[8] Plaintiff's Exhibit 79-160, pp. 140-141 (red page numbering).

[9] Plaintiff's Exhibit 79-6.

Thereafter, meetings were held with the non-reservation owners. A. G. Avery, the United States Attorney, participated in all of the meetings, representing the United States. It became apparent that it would be necessary to deal with the non-reservation owners as a group and powers of attorney from the water users to a designated committee of land owners were then obtained. [10]

After the north side water users had established their committee with power to act, Chief Engineer Code was directed by Secretary Garfield to come to Yakima and proceed with negotiations. The United States Attorney, A. G. Avery, continued to act as attorney for the Government, and H. J. Snively represented the north side water users. [11] The Agreement, before consummation, was transmitted by Chief Engineer Code to Secretary Garfield and received specific approval of Secretary Garfield and the Commissioner of Indian Affairs, C. F. Larrabee. [12] At the direction of the Secretary it was signed by Chief Engineer Code on behalf of the United States, and by the Water Users' Committee, on

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[10] Defendants' Exhibit 122-A, Testimony of John H. Lynch, pages 548-551.

[11] Testimony of John H. Lynch, Defendants' Exhibit 122-A.

[12] Plaintiff's Exhibit 79-159, pp. 28-29 (red page numbering).

May 9, 1908, and was approved by Frank Pierce, First Assistant Secretary of the Interior, June 30, 1908.

As the Agreement itself states, it constituted a permanent settlement of a dispute between the parties, executed to avoid threatened litigation:

> "THIS MEMORANDUM AGREEMENT, Made this ninth day of May, 1908, by and between the United States of America and its assigns, acting in this behalf by W. H. Code, Chief Engineer of Irrigation Indian Bureau, thereunto duly authorized by the Secretary of the Interior, party of the first part, and W. W. Glidden, et al users of water from the Ahtanum Creek on lands located north of and adjacent to the Yakima Indian Reservation, in Yakima County, State of Washington, their heirs, administrators, executors and assigns, acting in this behalf by D. E. Lesh, A. D. Eglin, J. . Wiley, D. B. Greenwalt, William H. Moyer, C. P. Swain, and H. D. Winchester, their duly appointed and constituted attorneys, party of the second part, WITNESSETH,
>
> "THAT WHEREAS the parties hereto claim certain quantities of water in Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes; and
>
> "WHEREAS, a dispute exists as to the extent of the respective rights of the said parties in and to said water.
>
> "Now, THEREFORE, the parties hereto, in order to avoid litigation and in order to limit and define their said respective rights in and to the waters of the said Ahtanum Creek, do mutually covenant and agree as follows:
>
> "ARTICLE 1. The party of the first part agrees to

> limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named." [13]

The agreement dividing the water 75% to the north side water users and 25% to the south side water users has been the basis of the north side's water rights since its execution. It did not purport to limit diversions by either side to the portion of the year ending July 10 or on any other date. Neither the south side users (substantially all being white tenants of Indian allottees for the 3500 acres of Indian owned land, together with those water users on 1000 acres in white ownership entirely) nor the north side users (for the most part descendants of the original pioneer settlers) have ceased to irrigate on July 10. Both for over 50 years, have irrigated with the waters in the creek.

Almost immediately after execution of the 1908 Agreement, and by 1915, the United States Indian Service, despite the fact that the agreement was based on 1500 irrigated acres on the south side, constructed irrigation works to make additional acreage susceptible

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[13] Appendix B, page 17.

to irrigation, and increased the total acreage irrigated annually on the south side to approximately 4500 acres as of the present time, thus creating an immediate and continuing demand for more water on the south side than had been retained by it in the 1908 agreement.

It also appears that additional acreage has been brought under cultivation on the north side, so that approximately 6400 acres is presently irrigated on the north side directly from Ahtanum Creek, (as compared to 5500 acres reported in 1907 by Code) but the north side has never claimed or demanded more water than was vested in the north side by the 1908 agreement. [14]

In 1925 the State of Washington instituted a proceeding to adjudicate the priorities among the north side water users [15] of the 75% of the natural flow recognized by the 1908 agreement. The United States was not a party to that suit, although it had an opportunity to appear. The resulting decree determined the relative rights of the north side water users among themselves, and under it certificates of title under state law were issued to the water users. [16] These certificates do not terminate the appropriators' right to divert on July 10, but are for the entire irrigation season.

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[14] Defendants' Exhibits 151, 152, 152-1.

[15] In re Ahtanum Creek, 139 Wash. 84, 245 Pac. 758.

[16] Defendants' Exhibit 31.

The present case was initiated on July 2, 1947, when the United States filed a complaint against over 700 north side water users and the Ahtanum Irrigation District *seeking the entire flow of the stream during the months of July, August and September on behalf of the Yakima Indian Tribe*. The State of Washington thereafter intervened. The trial in the District Court resulted in a judgment of dismissal,[17] from which the United States appealed. On July 10, 1956, the Court of Appeals for the Ninth Circuit filed it opinion,[18] which upheld the validity of the 1908 agreement dividing the waters of Ahtanum Creek 75% to the north side and 25% to the Yakima Indian Tribe, but remanded the case to the District Court for the purpose of making factual findings. Petition for writ of certiorari to this Court was denied January 28, 1957.[19]

Following remand, a Special Master, Honorable Smithmoore P. Myers, Dean of the Gonzaga University Law School, was appointed and conducted hearings which extended from March 18, 1957, to September 26, 1959, consuming 135 trial days and producing a voluminous factual record. The Master filed his detailed re-

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[17] United States v. Ahtanum Irr. Dist., 124 F. Supp. 818 (E. D. Wash. 1954).

[18] 236 F. 2d 321 (1956); Appendix C, page 25.

[19] 352 U. S. 988.

port [20] and proposed findings of fact, conclusions of law, and proposed judgment on the 15th day of April, 1960. He held in essence that the petitioners were entitled to 75% of the flow of Ahtanum Creek up to a flow of 76.3 c. f. s. and that the Indian Tribe was entitled to all of the flow in excess. He reported the acreages irrigated in 1908. Extensive exceptions were taken by the United States and the matter was argued on the Master's Report and exceptions before the Honorable William J. Lindberg, United States District Judge, who thereafter rendered his opinion, [21] and entered findings of fact, conclusions of law, and judgment [22] on the 30th day of January, 1962, which in most respects affirmed the report of the Special Master and adopted his proposals. Petitioners, Ahtanum Irrigation District, et al, filed objections to certain of the District Court's conclusions and made proposals in their stead. [23]

The United States appealed from the judgment of the District Court and, as noted, *supra*, the Court of Appeals rendered its opinion and judgment of the Court

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[20] Appendix D, page 75.

[21] Appendix E, page 139.

[22] Appendices F and G, pp. 160, 182.

[23] Appendix H, page 187.

of Appeals on March 18, 1964, [24] in which it "remanded with instructions." The Court of Appeals denied petition for rehearing on November 2, 1964. [25]

The 1964 opinion of the Court of Appeals for the Ninth Circuit generally accepts the findings and conclusions and judgment of the District Court, but with important exceptions in which the opinion modifies that judgment.

The critical modification of that opinion is this: Although the agreement of 1908 between the United States on the one hand and the north side water users on the other, is affirmed as a valid and binding agreement of the United States, dividing the waters of Ahtanum Creek 25% to the Indian Reservation on the south side and 75% to the users on the north side, the opinion of the Court of Appeals would limit the use of the water by the north side owners to a period in each irrigation season ending on July 10, just as the need for water becomes critical.

The specific language which the Court of Appeals added to the District Court's decree reads (330 F. 2d at 915 (1964):

"After the tenth day of July in each year, all the

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[24] 330 F. 2d 897; Appendix I, page 190; Appendix K, page 244.

[25] 338 F. 2d 307; Appendix J, page 241.

> waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of Ahtanum Creek, to the extent that the said water can be put to a beneficial use."

It is the importation of this language, not found in the 1908 agreement, which would destroy this valley by depriving it of all water for all purposes during the dry months. It is this innovation which brings petitioners to the Supreme Court of the United States seeking relief from the threatened destruction of their economy.

This is not a case in which powerful white men overreached helpless Indians. On the contrary, this is a case in which the parties were, on the one side, a struggling pioneer community of some 200 farm families, and, on the other side, the Secretary of the Interior, aided by the United States Attorney, the Commissioner of Indian Affairs, and the Chief Engineer of the Indian Irrigation Service. The question is whether, 57 years after the event, the contract that they signed and ratified, to permanently divide, by percentages, the water that both sides needed, is now to be retroactively rewritten so as to give the north side community no water at all during the dry half of the irrigation season.

## REASONS FOR GRANTING THE WRIT

Petitioners urge the following reasons for granting the writ of certiorari:

(1) *The erroneous construction by the Court of Appeals of the subject matter of the 1908 agreement, i. e., the "natural flow" of Ahtanum Creek, conflicts with several decisions of this Court employing the term "natural flow" in its commonly accepted usage, and with prior decisions by the Ninth Circuit and at least one other Circuit accurately construing the term.*

Article 1 of the 1908 agreement specifies a limitation on the claims of *both* the Indian *and* the north side users keyed, in both instances alike, to percentages of the "natural flow" of Ahtanum Creek. Article 3 specifically defines "natural flow". There is no qualification in the agreement which restricts the natural flow to any particular time period. [26] There is no implication that as of July 10 the percentages change, so as to increase the Indians' percentage from 25% to 100%, and to decrease the north side users percentage from 75% to zero. Such an implication would be completely contrary to the intentions of the parties to the Agreement and wholly unjustified under the circumstances existing in 1908 and before, which led to the execution of the Agreement.

Absent any time restriction on the "natural flow" allocation, that phrase must be given its customary meaning to encompass all water naturally flowing in a stream at any time.

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[26] Appendix B, pages 17-22.

"Natural flow" is a term which has been employed uniformly by this Court in its accepted fashion in a number of interstate water controversies.[27] In *Nebraska v. Wyoming*, 325 U. S. 589 (1945), the court apportioned the natural flow of the North Platte, which it defined as follows (*id.* at 605):

> " . . . 'natural flow', as used by the Special Master and as used in this opinion, means all water in the stream except that which comes from storage water releases."

The Ninth Circuit has previously recognized the unrestricted compass of the term in *Gila Valley Irr. Dist. v. United States*, 118 F. 2d 509 (1941) in which it was defined as follows:

> "The natural flow of the stream is the amount of water which would flow therein if there was (sic) no artificial interference with the flow."

Similarily, the Court of Appeals for the Eighth Circuit has employed the term in its customary usage in *United States v. Tilley*, 124 F. 2d 850 (1941), *cert. denied*, 316 U. S. 691 (1942).

(2) *The decision of the Court of Appeals unnecessarily visits disaster upon a long-established irrigation economy, and the decision conflicts with equitable principles which this Court has followed in other water right*

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[27] See, e. g., Wyoming v. Colorado, 259 U. S. 419, 467, 470, 471, (1912); New Jersey v. New York, 347 U. S. 995, 1000 (1954); Colorado v. Kansas, 320 U. S. 383, 390 (1943).

*cases in order to protect existing economies from destruction.*

The novel addendum to the agreement of 1908 made by the Court of Appeals (reducing the north side's share from 75% to zero during the driest two-and-a-half months of the irrigation season) results in substantial destruction of the irrigation economy upon which this little community [28] has depended for more than a half-century. By contrast, this Court has refused to destroy an existing economy, not only in cases where there was doubt about the priority of its water rights, *Arizona v. California, et al.*, 373 U. S. 546, 563-64, 592-94 (1963), but even where the existing economy was founded on rights junior to those of other users. *Nebraska v. Wyoming*, 325 U. S. 589, 618, 621 (1945). *A fortiori*, this Court should exercise its jurisdiction to review a decision destroying the economy of the Ahtanum Valley, a decision which was reached solely by distortion of the plain language of an agreement designed specifically to preclude that very result.

The 1908 agreement provided a formula for the allocation of the natural flow, at any time and in whatever amount it might be available. As a practical matter, the formula is meaningful only in times of shortage,

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[28] The community now consists of about 500 families, of whom about 240 families are farmers. Agriculture is the sole underlying industry.

i. e., during the summer irrigation season, the very time when the Court of Appeals now construes it as being intended to become inoperative. There is no controversy, no need for proration, when the water supply is abundant. Both the north side users and the south side users (white tenants of allottees, white patent owners and a few Indians) have developed their economies within the framework of that agreement. Both, of course, have used water after July 10 to the extent it was available during the 50 years which have elapsed since the making of the agreement. This is their practical and uniform construction, and the only sensible construction. Water is available in the creek after July 10, as it was before 1908, and petitioners are entitled to their share of that water.

The far-reaching and disastrous effect of the deprivation of summer irrigation water, imposed by the present opinion, will be recognized by this court. Irrigation of petitioners' lands on the north side of Ahtanum Creek began approximately 113 years ago in the year 1852, and has continued during every irrigation season. The fathers and grandfathers of those presently living and farming in the Ahtanum Valley were invited into this area by the United States Government as pioneers, and encouraged to settle, irrigate and farm these lands for themselves and their descendants.

The Government, on its own volition, entered into

a solemn contract in 1908, making a division of the waters of the creek, which agreement the Court of Appeals upheld as valid.

Since 1908, two generations of people have moulded their lives in reliance upon the Government's word. Farmers, cattle raisers, orchardists, hop growers, business men and wage earners have developed the north side of Ahtanum Creek. Schools, churches, and towns have been built. The population has increased; the land has been utilized principally for the purpose of raising of crops; and a whole community of citizens of the State of Washington – a small community, but nevertheless entitled to live – is now making its livelihood in the Ahtanum Valley, relying upon receiving its share of the waters of Ahtanum Creek each irrigation season– and during *all* of the irrigation season – under the 1908 agreement.

Now, over fifty years later, the Court of Appeals has emasculated the agreement by adding to it a clause never agreed upon, which deprives the descendants of the pioneer settlers of all water shortly after the commencement of the summer irrigation period on July 10th of each year, for the very period when the percentage allocation becomes vital. The decree entered by the Court of Appals will most certainly render impossible economic farming of the valley in which the descendants of the 1908 pioneers still live. It will in effect de-

stroy the long-established economy of the Ahtanum Valley and of the families that are dependent upon Ahtanum Valley farming. A decision producing such unconscionable results should be reviewed by this Court.

(3) ***The Supreme Court should exercise its supervisory powers because the Court of Appeals improperly rejected the concurrent findings of fact of a Special Master and a District Court, in contravention of Federal Rule 52(a) requiring the acceptance of such findings unless "clearly erroneous."***

The length of time when water is available in any given year is wholly irrelevant, either to the interpretation of the 1908 Agreement, the underlying appropriative rights of the settlers, or the underlying reserved rights of the United States on behalf of the Indians. The water rights on both sides, howsoever founded, apply to whatever water is available at all times for the purposes set forth in the agreement.

But even if the question of the magnitude of the stream flow after July 10 in the year 1908, or any other year, were relevant, the Court of Appeals erred by contravening Rule 52(a) in its finding the period of availability of water for irrigation use for the petitioners and their predecessors did not extend beyond July 10 in each year. [29] There was evidence which persuaded the

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[29] United States v. Ahtanum Irrigation District, Appendix I, pp. 213-214.

Special Master and the District Court to make their concurrent findings to the contrary — which the Court of Appeals ignores — that there was water flowing in Ahtanum Creek during the irrigation season, and which was continuously needed and used for the *entire irrigation season.*

Finding No. 15 of the Special Master, adopted by the District Court, [30] found that the north side users

> "have established that their diversion requirements are 4.8 acre-feet during the year 1957 and were 3.7 acre-feet in the year 1908, with a *continuous flow requirement* of one-half miner's inch per acre *during the irrigation season.*" (Emphasis added.)

Indeed, in the lower court the United States *contended* that the "irrigation season" extended through July, August and September, which is an undisputed fact. [31] That is the very reason it brought this suit in the first place, to quiet its title to the whole flow in those three months. If the water does not, and never did, flow after July 10, what was there to sue about? Has the United States persisted in 18 years of litigation at staggering expense to these farmers to establish its title to a summer flow that does not, and never did, exist? If the creek did run in the summer during the years before 1908, the whole premise of the Court of

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[30] Appendix F, page 169.

[31] Contentions of United States in Pretrial Order on Merits, R. 251.

Appeals collapses. The findings of the Special Master and the District Court incorporated by reference the statement of agreed facts stipulated to by all parties. The Unied States Geological Survey stream flow records of the North and South Forks of Ahtanum Creek, which are a part of those agreed facts, show that in 1908 the stream flow as to quantity during the month of July was 6970 acre-feet with a maximum flow of 187 c. f. s., a minimum flow of 59 c. f. s., or an average flow of 112.5 c. f. s. In August, the quantity of water was 2715 acre-feet with a maximum flow of 59 c. f. s., a minimum flow of 36 c. f. s., or an average flow of 43.7 c. f. s. *Water for irrigation continued to be available after July 10 in 1908 and throughout each succeeding irrigation season thereafter without exception.* [32]

This summer water was most certainly needed and used by the north side farmers, for how else were late water crops, such as orchard and hops, grown in the years 1907 and 1908 as was the testimony in the record? [33]

Twelve years before the 1908 agreement, in 1896, a dispute over the irrigation waters of Ahtanum Creek was determined by the Supreme Court of the State of

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[32] Exhibits incorporated and attached to Pretrial Order on the Merits, R. 314-318.

[33] R. 11988-13643. References are detailed in "Supplement to Petition for Rehearing" filed with Court of Appeals.

Washington. It involved a dispute over *summer irrigation water*, not spring run-off, and it is apparent from the decision of the court that there was water available for use for irrigation all summer in the Ahtanum Valley.[34] The Special Master pointed out in his report (Appendix D, pp. 111-112) that he found evidence of hops requiring late water on lands in the Valley in 1908, and further pointed out that land owners on the north side by their very participation in the cases of *In re Ahtanum Creek* and *Benton v. Johncox, supra*, evidenced their interest in the *late summer water* and not just in the "abundant flood waters of May and June".

When the Court of Appeals says that there was no water available for use by the petitioners and their predecessors after July 10, 1908, it is ignoring the record.

The Court of Appeals, by virtue of Rule 52(a) of the Federal Rules of Civil Procedure, was not empowered to set aside the findings of the District Court, which were based upon the findings of the Master (see Rule 53(e)(2)), unless it could find them to be clearly erroneous. The Court of Appeals simply stated that there was a unanimity of evidence to the contrary. It was grievously mistaken in arriving at such a conclusion.

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[34] Benton v. Johncox, 17 Wash. 277, 49 Pac. 495. The Special Master determined the 1908 diversion duty by reference to this very case. App. D, page 104 et seq.

This Court has held that findings are clearly erroneous only when:

> "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [35]

The record in this case will not support such a conclusion. Moreover, there was ample evidence to sustain the findings of season-long irrigation, and

> "such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' " [36]

The unwarranted action of the Court of Appeals in substituting its novel finding of non-availability of irrigation water after July 10 for the lower court's findings of season-long availability constitutes such a departure from the prescribed rules relating to the weight to be given to the findings of a trial court as to justify this Court in exercising its supervisory porwers in this case. Intervention by this Court is doubly justified because of the tragic consequences which flow from the unwarranted action of the Court of Appeals.

(4) *The Court of Appeals based its opinion that under the 1908 Agreement all water for the north side users should be terminated during the critical latter*

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[35] United States v. U. S. Gypsum Co., 333 U. S. 364, 394-95 (1948).

[36] United States v. Yellow Cab Co., 338 U. S. 338, 341-342 (1949).

*half of the irrigation season, on an erroneous construction of the laws of Washington as to the rights which the 1908 Agreement afforded, in contradiction to the construction of those laws by the Supreme Court of the State of Washington.*

The Court below characterized the 1908 agreement (330 F. 2d at 902), as did the District Court: "An agreement of this type, favored in the law as it operates to settle disputes, does not convey title to either party but merely establishes their respective rights," and said (with reference to its first decision in 236 F. 2d 321 ( 956)): "In short, our conclusion that the Secretary had this power was predicated upon our holding that the white settlers might in fact have water rights in and to the stream." (*id.* at 903.)

But the Court completely misconstrued the law of the State of Washington to arrive at the conclusion that the preexisting appropriative rights of the settlers ended on July 10 each year because there was no water after that date. The Court's factual premise, that water ceased to flow after July 10, contradicts concurrent findings of the Special Master and the District Court. (See part 3.) From this mistaken factual premise it moves to a mistaken legal conclusion.

The Court said (330 F. 2d at 908): "applicable here is the rule universally recognized as a part of the

law of waters in the western states that a water right may be measured by time as well as by volume." The Court has applied the wrong rule, and it conflicts with a decision of the Supreme Court of Washington construing State law in connection with the application of this very same 1908 agreement to these same state-generated water rights of the pioneer settlers. *(infra).*

Of course, an appropriation may be limited as to time, as in cases where appropriators rotate, by days of the week, their diversions from a stream, or where a junior appropriation is limited to the surplus available during specified months of high water, or where the appropriation, on its face, is limited to the time during which the appropriator has need for the water, e. g., the summer irrigating season, not the winter. State administrative agencies write such accommodations into the permits and certificates they issue, and courts write them into their decrees. That is not this case. The appropriations here were for irrigation purposes. Irrigation is needed during the hot summer months, July, August, September., (That is why the Government sued for the whole flow during those same months.) The appropriations were not "measured by time" either on their face or in the certificates which the State issued. Under the laws of Washington the *res* to which the appropriations in this case were applicable was the *whole* flow of the stream for the *whole* time that water ap-

peared in the stream and was required for irrigation.

The 1908 agreement accorded the pioneer settlers 75%, the Indians 25% of that same *res*. It did not limit either of them as to time, it did not reduce the one or enlarge the other, as the stream rose and fell. Neither side was to be destroyed by drouth; that was the very purpose of the agreement.

The State of Washington, with the encouragement of the Government, adjudicated the water rights vested in the north side users in 1925 in *In re Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758. The Supreme Court of the State of Washington understood that the waters to which the appropriations of the north side users were related under Washington law were *all* the waters for *all* of the season. It did not construe the laws of Washington as limiting these rights to the wet season of the year. It was the whole flow which was therein referred to as the "natural flow," apportioned and divided between the United States on the one hand and residents of the State of Washington on the other. The court said (139 Wash. at 88, 245 Pac. at 760):

> "Twenty-five per cent of the *water of the streams* is owned by the United States, and controlled and administered by the Indian Bureau for the use and benefit of Yakima Indian lands under irrigation, *leaving seventy-five per cent of the waters to be adjudicated herein.*" [37] (Emphasis added.)

[37] The Referee in his report on the adjudication (Defendant's Exhibit 14, page 6) and the Superior Court of Yakima County in its Decree (Defendants' Exhibit 13, page 2) interpreted the agreement to the same effect.

There is no suggestion that the appropriations to be adjudicated were only good against those waters which flowed before July 10.

The decisions of the courts of the State of Washington have always contemplated a full seasonal use of irrigation water.[38] The Supreme Court of the State of Washington in water rights matters prior to and immediately following 1908 uniformly indicated that the "natural flow" of waters as applied to those with riparian rights meant the *full flow of the water without diminution and without alteration.*[39] Thus, in 1905, immediately preceding the agreement, the Supreme Court of the State of Washington, in *Madson v. Spokane Valley Land Co.*, 40 Wash. 414, 82 Pac. 718, had described a riparian right as encompassing *"the uninterrupted use* of the water in its *natural flow* or condition upon his land." (Emphasis supplied.)

Following the 1925 decision, certificates were issued by the State of Washington to these appropriators. (R. 9132, Defs. Ex. 31) These certificates show rights

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[38] "Thus it will be seen that the measure of the appropriation, as defined in § 1 of the act of November 13, (supra, p. 7 herein) is the making of 'said land available for agricultural purposes to the full extent of the soil thereof.' " Longmire v. Smith, 26 Wash. 439 at P. 448, 67 Pac. 246 at p. 249 (1901).

[39] Still v. Palouse Irrigation and Power Co., 64 Wash. 606, 117 Pac. 466 (1911); New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901).

of diversion in cubic feet per second for specified tracts of land. Neither they nor the pre-1908 appropriations which they express, purport to be appropriations "measured by time."

The Court of Appeals was completely wrong in its interpretation of Washington law in which it assumed that the pioneers' appropriations were "measured by time." It was therefore wrong when it concluded that, since they owned nothing after July 10, the agreement of 1908 was not intended to recognize any right in them after that date. It was thrice wrong when it deduced from these false premises, 56 years after the event, that the United States, in making this agreement with these pioneers, had intended (and that they had agreed) that they should have no water at all during the season of the year when they needed it most, and that this was what the law of their State had meant when they had made the appropriations, long before 1908, which the United States proposed that they settle in that year.

The Court of Appeals has not only misconstrued the law of Washington: it has created an innovation in western water law which, if allowed to stand, will shake the foundations of all appropriations of the characteristically summer-parched natural flow of the streams in all of the states in the Ninth Circuit. The innovation: that an appropriation of natural flow, although not limited on its face to a specified season of the year, and irre-

spective of priorities, is cut off by operation of law upon the onset of the low summer flow season; and that the low flow may then be taken by another.

## CONCLUSION

This tragedy began with the decision of the United States, in 1907, not to file the bill in equity which it had prepared at the request of the pioneer settlers in order to determine the relative rights of the Indians and the settlers to the low summer flow of the creek. Instead, in 1908, the Secretary of the Interior proposed, and the settlers accepted, a compromise agreement which divided the water between them. Forty years later, in 1947, the government filed this suit, *first* to repudiate the Secretary's authority to make the compromise that he had persuaded the settlers to sign, (the lower court refused to permit that), *second* to construe the agreement so as to take away from these farmers the entire flow of the stream in July, August, and September—the three months of scarcity which had necessitated the agreement in the first place.

Although this summer flow is so valuable in the dry season that the government now has spent eighteen years in litigation to take it away from our people, the rationale of the Court of Appeals opinion is that the 1908 agreement was not intended to cover this summer flow because there was none after July 10.

The end result, if this strange opinion is permitted to stand, will be to destroy a community whose livelihood depends now, just as it did before these farmers made the 1908 agreement and just as it has depended during the half century which has since elapsed, upon their right to use their agreed share of the waters that the Court of Appeals asserts do not exist but which the government nevertheless, seeks to take.

Water for Indian farmers is not involved here except in two or three instances. The bulk of the Indian lands are rented to white farmers and what is actually involved here is rental money. Judge Chambers, in his concurring opinion,[40] pointed the way for the Government. It has its Congress where relief may be sought for any injustice of the past for which it is responsible. The solution to injustice to the Indians, if there be any, does not lie in an attempt to take away the water which the north side users now own and to give it to the south side. Promulgating another injustice on these innocent petitioners is not the course of fairness or of wisdom.

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[40] United States vs. Ahtanum Irrigation District, et al, 236 F. 2d 321 (1956) Appendix C, at pages 73-74.

For the reasons stated in this petition, we respectfully ask that certiorari issue to review the decision below.

Respectfully Submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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No.....

AHTANUM IRRIGATION DISTRICT, a corporation, and THE STATE OF WASHINGTON, et al,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## APPENDIX INDEX


Page

APPENDIX A, Treaty of 1855 ..... 5

APPENDIX B, 1908 Agreement ..... 17

APPENDIX C, First opinion of Court of Appeals for the Ninth Circuit, United States of America vs. Ahtanum Irrigation District, et al, 236 F. 2d 321 (C. A. 9, 1956) cert. den. 352 U. S. 988 (1956) ..... 25

APPENDIX D, Final Report of Special Master ..... 75

1. Preliminary ..... 75
2. The Validity and Nature of the Memorandum of Agreement of May 9, 1908 ..... 78
3. Effect of the Memorandum of Agreement of May 9, 1908 ..... 93
4. Determination of Division of Waters ..... 101
5. Waste ..... 119
6. Alternative Sources of water ..... 130
7. Prescription ..... 134
8. Class III Defendants ..... 135
9. Conclusion ..... 136

APPENDIX E, Opinion of United States District Judge, William J. Lindberg of July 6, 1961, as revised January 26, 1962 ..... 139

1. Preliminary ..... 139
2. Nature of the Agreement of 1908 ..... 146
3. Scope of adjudication and jurisdiction ..... 149

Page

4. Remaining Findings of Fact and Conclusions of Law ..... 155

5. Waste ..... 156

APPENDIX F, Findings of Fact and Conclusions of Law of United States District Court of January 30, 1962 ..... 160

APPENDIX G, Decree of United States District Court of January 30, 1962 ..... 182

APPENDIX H, Objections of defendants to Court's Conclusions of Law, and defendant's proposed alternative conclusions of law ..... 187

APPENDIX I, Second opinion of Court of Appeals for the Ninth Circuit, United State of America vs. Ahtanum Irrigation District, et al, 330 F. 2d 897 (C. A. 9, 1964) ..... 190

APPENDIX J, Opinion of the United States Court of Appeals for the Ninth Circuit on Petition for rehearing, 338, F. 2d 307 (C. A. 9, 1964) ..... 241

APPENDIX K, Judgment of March 18, 1964 ..... 244

APPENDIX "A"

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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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### Treaty With the Yakima, 1855

June 9, 1855.

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head

chiefs, chiefs, head-men, and delegates of the Yakima, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-se, Liaywas, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kal-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purpose of this treaty are to be considered as one nation, under the name of "Yakima," with Kamiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to-wit:

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia' River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119° 10'), which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe

of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokane; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of ndians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac"; thence southerly to a point on the Yakima River called Toh-mah-luke; thence in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

Article 2. There is, however, reserved, from the lands above ceded for the use and occupation of the

aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit: Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakima, eight miles below the mouth of the Satass River; and thence up the Yakima River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, except those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the meantime it shall be lawful for them to

reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

Article 3. And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them, as also the right,

in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Article 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of Two Hundred Thousand Dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next

five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All of which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Article 5. The United States further agrees to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmith, one tinner, one gunsmith, one car-

penter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land The said salary to be paid to, and the said

house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakima Nations, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Article 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 7. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

Article 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington, or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and band of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

Article 10. And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery" which said reservation shall be surveyed and marked out whenever the President may direct, and may be subject to the same provisions and restrictions as other Indian reservations.

Article 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs, headmen, and delegates of the aforesaid

confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent. (L.S.)
Kamaikun, his x mark (L.S.)
Skloom, his x mark (L.S.)
Owhi, his x mark (L.S.)
Te-cole-kun, his x mark (L.S.)
La-hoom, his x mark (L.S.)
Me-ni-nock, his x mark (L.S.)
Elit-Palmer, his x mark (L.S.)
Wish-och-kmpts, his x mark (L.S.)
Koo-lat-toose, his x mark (L.S.)
Shee-ah-cotte, his x mark (L.S.)
Tuck-quille, his x mark (L.S.)
ka-loo-as, his x mark (L.S.)
Scha-noo-a, his x mark (L.S.)
Sla-kish, his x mark (L.S.)

Signed and sealed in the presence of – James Doty, secretary of treaties; Mie. Cles. Pandosy, O.M.T.; Wm. C. McKay; W. H. Tappan, sub Indian agent, W. T.; C. Chirouse, O.M.T.; Patrick McKenzie, interpreter; Joel Palmer, superintendent Indian affairs, O. T.; W. D. Biglow; A. D. Pamburn, interpreter.

## APPENDIX "B"

## AGREEMENT OF 1908

(Defs. Ex. 116 U. S. A. – Pl. Ex. 79-6)

This Memorandum of Agreement, Made this ninth day of May, 1908, by and between the United States of America, and its assigns, acting in this behalf by W. R. Code, Chief Engineer of Irrigation, Indian Bureau, thereunto duly authorized by the Secretary of the Interior, party of the first part, and W. W. Clidden, et al. users of water from the Ahtanum Creek on lands located north of and adjacent to the Yakima Indian Reservation, in Yakima County, State of Washington, their heirs, administrators, executors and assigns, acting in this behalf by D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. P. Swain, and H. D. Winchester, their duly appointed and constituted attorneys, party of the second part, Witnesseth,

That Whereas the parties hereto claim certain quantities of water in the Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes; and

WHEREAS, a dispute exists as to the extent of the respective rights of the said parties in and to said water,

Now, Therefore, the parties hereto, in order to avoid litigation and in order to limit and define their

said respective rights in and to the waters of the said Ahtanum Creek, do mutually covenant and agree as follows:

Article 1. The party of the first part agrees to limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named.

Article 2. It is understood and agreed that the Secretary of the Interior may appoint a competent hydrographer to measure the water in said Ahtanum Creek and to determine the amount thereof to which the party of the first part is entitled, at any and all times, by virtue of this agreement.

Article 3. It is further understood and agreed that the waters flowing in said Ahtanum Creek shall be measured at a point on said stream locally known as The Narrows, located about one-fourth of a mile west of the point of intersection of said stream with the west line of Section 14, Township 12 North, Range 16, E.W.M. in said County and State. To the amount

thus ascertained to be in said stream at said point shall be added the amounts of water diverted from said Ahtanum Creek, including its North and South Forks, so-called, above said point of measurement. The total amount of water thus ascertained shall be deemed the natural flow of Ahtanum Creek and the party of the first part shall receive twenty-five per cent (25%) thereof as the amount of said waters to which it is entitled by virtue of this agreement, for use on its lands south of said stream; provided, however, that if it appears at any time that there is an appreciable seepage or return flow to the main channel of said stream below said point of measurement, then such seepage or return flow shall be divided between the parties hereto in the same proportion as herein provided for the division of the natural flow of said stream.

Article 4. It is further understood and agreed that the parties hereto may divert the low water flow, or any part thereof, of said stream, to which they are entitled under the provisions of this agreement, in main canals from any point or points on their respective sides of said stream below the point of measurement hereinbefore located and locally known as The Narrows. If, however, it should be determined in the future by either party hereto, to construct a main canal with its heading at any point between said Narows and the junction of the north and south channels of said stream,

located in Section 13, township 12 North, Range 16 East W.M., the other party hereto shall have the election to join in the construction of that portion of said canal above the junction of the north and south channels aforesaid, which said portion shall be constructed with a capacity sufficient and shall serve to carry the total amount of water diverted by both parties. The cost of the construction of such portion of said canal as may be so jointly constructed shall be borne by the first and second parties in proportions of one-fourth and three-fourths respectively, and the cost of maintenance and repair of the same shall be borne in like proportions. In case such canal shall be located on the south side of said stream, the party of the first part will furnish a right of way therefor between the points named. If, however, said canal should be located on the north side of said stream, the right of way therefor between the points named, shall be furnished by the party of the second part.

Article 5. It is further understood and agreed that wherever water is diverted from the main channel of Ahtanum Creek by one or more of the water users hereinbefore referred to, or by the party of the first part, a substantial headgate shall be installed and maintained by said water user or water users or by the party of the first part, as the case may be, which headgate shall be of such construction that it can be adjusted and

locked by the ditch master hereinafter provided for, and such water user or water users and the said party of the first part shall install and maintain as near as practicable to such headgate a suitable measuring device which shall be a cippoletti weir where practicable.

For the purpose of the division of the waters of the Ahtanum Creek as herein provided for, each of the said parties hereby agrees to appoint on or before the fifteenth day of June of each and every year, a ditch master, whose duty it shall be to so close, regulate, or adjust the headgates of the party so appointing him, that no more water will be diverted from said Ahtanum Creek by the parties hereto than said parties are respectively entitled to under the provisions of this agreement, and the ditch masters thus appointed are hereby clothed with all necessary authority to do and perform any and all acts necessary to the proper division of said water, and to that end shall receive orders and instructions from the hydrographer appointed by the Secretary of the Interior as to the amounts to which each of the parties hereto is entitled from time to time; provided, however, that nothing contained in this Article shall be construed as settling the rights of the various water users as to their respective rights to the use of water herein conceded to said second party.

Article 6. It is further understood and agreed that the water herein divided between the parties hereto

may be used for domestic, power, stock, and irrigation purposes.

Article 7. No Member of or Delegate to Congress, officer, agent or employee of the Government is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, and sections 3739, 3740, 3741, and 3742 of the Revised Statutes of the United States, so far as same may be applicable, are part of this contract.

In Witness Whereof, the parties have hereto signed their names the day and year first above written.

W. W. Code,
Chief Engineer of Irrigation, Indian Bureau,
For and on behalf of the United States of America, Party of the first part.

W. W. Glidden, et al.

D. E. Lesh
A. D. Eglin
J. J. Wiley
D. B. Greenwalt
William H. Moyer
C. F. Swain
H. D. Winchester

Their Attorneys in fact, Party of the Second part.

State of Washington,
County of Yakima—ss.

I, John H. Lynch, a Notary Public in and for said County and State, do hereby certify that personally appeared before me D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. F. Swain, and H. D. Winchester, personally known to me to be the individuals who executed the within and foregoing instrument of writing as Attorneys in fact for and on behalf of W. W. Glidden, et al. The principals named in said instrument, and each for himself and not one for the other, acknowledged to me that he executed the same as the free and voluntary act and deed of the said principals and each of them for the uses and purposes therein mentioned.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this ninth day of May 1908.

/s/ JOHN H. LYNCH

(Seal)

Notary Public in and for the State of Washington, residing at North Yakima, Washington

Approved this 30th day of June, 1908

FRANK PIERCE,
First Assistant Secretary
of the Interior.

# APPENDIX "C"
## 236 F. (2d) 321

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Before
POPE, LEMMON and CHAMBERS, Circuit Judges
POPE, Circuit Judge

This is a suit brought by the United States as trustee for the Yakima tribe of Indians to establish and quiet title to the Indians' right to the use of the waters of Ahtanum creek in the State of Washington, which is alleged to have been reserved by the treaty of June 9, 1855 between the United States and the Confederated Tribes of Yakima Indians.[1] This was the treaty by which the Yakima Indian reservation was set aside for the Indians. The defendants in the main are the non-Indian owners of lands outside the reservation who had appropriated or claimed rights to the use of the waters of the stream which formed the northern boundary of the reservation.[2]

Holding that the United States had not proved that it, as trustee or otherwise, had any right, title or

[1] The treaty appears at 12 Stat. 951. It was ratified by the Senate March 8, 1859.

[2] Also named are certain so-called "Class Three Defendants" who are individual owners of irrigable land within the Indian reservation boundaries and who are the successors in interest to the Indian allottees whose allotments were patented in fee simple and subsequently sold to these defendants.

interest in any water of Ahtanum Creek,[3] the trial court dismissed the action and the complaint on the merits.

The complaint sets out the treaty whereby a certain tract of land in the then Territory of Washington was set aside and reserved for the use of the Yakima tribe as a home and abiding place of the Indians. It alleged that in view of the purposes of the treaty, its intention to encourage the Indians to give up their nomadic habits and to till the soil, and also in view of the arid character of the lands within the reservation which required irrigation for successful cultivation, the treaty operated to reserve sufficient waters of Ahtanum Creek for the Indians' needs, both present and future. The complaint further alleged that on May 9, 1908, "in direct violation of the rights * * * reserved to the Yakima tribe," the then chief engineer of irrigation, Bureau

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[3] Conclusion of Law (1). "That plaintiff has not proved that the United States, as trustee or otherwise, has any right, title or interest in any water of Ahtanum Creek as appurtenant to the Reservation as a whole or appurtenant to any parcel or collection of parcels located thereon by virtue of any reservation, express or implied, in the Treaty of 1855 or otherwise or at all."

Conclusions of Law (4). "That plaintiffs have not proved that the Yakima Indian Nation, the Confederated Tribes of Yakima Indians, any Indian ward or allottee, or any person owning or occupying land on the Yakima Indian Reservation has any right, title or interest in any water right in Ahtanum Creek by virtue of any reservation in the Treaty of 1855, by reason of the fact that the Reservation borders on Ahtanum Creek, or because of any appropriation and beneficial application of any waters of Ahtanum Creek."

of Indian Affairs, entered into an agreement with certain white water users whose lands were situated outside of the reservation, whereby they were to have and be entitled to 75 percent of the natural flow of Ahtanum Creek and the Yakima Indians were to have the remaining 25 percent of that stream's natural flow. There was added to the prayer for an adjudication of the rights of the parties to the use of the stream waters, a prayer that the court adjudge this agreement of May 9, 1908 to be invalid and of "no force and effect."

The court held: 1, that there was no reservation of any water rights by the Treaty of 1855;[4] 2, that in any event the agreement of 1908 gave the white owners nothing that they did not already own;[5] and 3, that an adjudication in the courts of the State of Washington in 1925 determining the rights of the white landowners outside of the Indian reservation to the 75 percent of the natural flow of the stream, had been "encouraged" by the United States, and thus the United States was

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[4] Finding of fact No. 5: "That there was no reservation of any water rights to Ahtanum Creek by the Treaty of 1855, either express or implied, to the United States or to the Confederated Tribes, or individual Indians, adverse to defendants. That defendants owning lands north of the Ahtanum have not infringed upon any water rights of the United States, the Confederated Tribes, or individual Indians under the proof herein."

[5] "We are of the opinion that (the Secretary) did nothing but recognize the limitations set by practice upon the usage of water on the reservation and confirm the grants to the owners outside." 124 F. Supp. 818, at 835.

thereby barred from claiming any part of this 75 percent.[6] Accordingly, the court concluded that the cause should be dismissed.

In view of the action taken in the court below, it is apparent that we must consider the following questions, all of which are raised by the Government's specification of errors.

First, were any rights to the use of any of the waters of Ahtanum Creek reserved by the Treaty of 1855? If there were none, then the question of the validity of the agreement of 1908 need not be discussed.

Second, if it be concluded that by the treaty of 1855, rights to the use of the waters of Ahtanum Creek were reserved for the benefit of the Indians, were the rights thus reserved any greater than the 25 percent of the natural flow of the stream? If the right of the Indians, as reserved, did not exceed the 25 percent allocated to them in 1908, it would appear that no serious question can be raised as to the validity of that agreement.

Third, if the rights reserved for the Indians by the treaty were of the extent and size claimed by the United States, that is to say, rights to sufficient waters for the

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[6] Conclusion of Law (7). "That in 1926 the State of Washington, which then had jurisdiction over the waters of Ahtanum Creek, adjudicated all claims to 75% of the flow of Ahtanum Creek, which proceeding binds the United States and bars any claim to that portion of the flow."

needs of the Indians as they might exist in the future, then we must of necessity consider the validity and force of the 1908 agreement, for it is conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream. If the agreement purported to deprive the Indians of rights which actually belonged to them, then that circumstance must be considered in determining whether the Government officials in executing it exceeded their power and authority.

That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in Winters v. United States, 207 U. S. 564. Apart from the date of the treaty discussed in that case, the facts there are practically identical with those which attended the treaty of 1855 with the Yakima tribes. In the Winters case, as here, the reservation was created by treaty; the reserved lands were a part of a much larger tract which the Indians had the right to occupy; and the lands were arid and without irrigation practically valueless. In the Winters case the Milk River was designated as the northern boundary of the reservation. This court, in its decision (143 F. 740, 746), which the Supreme Court was affirming, had said: "We are of opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the court below, 'to insure to the Indians the means wherewith

to irrigate their farms', and that it was so understood by the respective parties to the treaty at the time it was signed." The attempted efforts to distinguish the Winters case from this one, are without force. [7]

It is true that the Yakima treaty described the Ahtanum as the north boundary of this reservation, whereas the boundary of Fort Belknap reservation in the Winters case was described as beginning at a point in the middle of the main channel of Milk river. But a tract of land bounded by a nonnavigable stream is deemed to extend to the middle of the stream. Hirt v. Entus, 37 Wash. 2d 418, 428, 224 P. 2d 620. [8] The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance. The same thing was true of the Milk River in Montana; and it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated

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[7] The suggestion that the Yakima treaty differs from that of the Fort Belknap Indians because of its earlier date, when irrigation was not so common, is without force. As hereafter noted, Indians were making some use of the Ahtanum waters for irrigation before 1855. Unanswerable is the statement of a witness before the Commission studying the Yakima river rights: "Among other things, for instance, the Indian Department was to maintain an agriculutral school to teach these Indians agriculture. What for? Why, they could not raise a bean without irrigation." P. 117, Senate Document 337, referred to infra note 11a.

[8] The course of this boundary is described in the treaty as follows: Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attahnam River to the Forks; thence along the southern tributary to the Cascade Mountains; * * * "

upon his lands or within the area of appropriation. Most streams in this portion of the country originate in the mountains and far from the lands to which their waters ultimately become appurtenant.

No significance attaches to the early date of this treaty for the record is plain that some irrigation from the Ahtanum had begun in this valley before 1855 in which the Indians had participated. It is true that this early use was on the north side of the Creek, but they then had occupancy of both sides, and we cannot assume that when they agreed to move to the south side of the Creek they surrendered all rights to use of the water. As in the Winters case, we must answer in the negative the questions there posed: "Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?" As was said in the Winters case, (207 U. S. 564, 576): "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people." When the Indians agreed to change their nomadic habits and to become a pastoral and civilized people, using the smaller reservation area, it must be borne in mind, as the Supreme Court said of this very treaty, that "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." United States v.

Winans, 198 U. S. 371, 381. Before the treaty the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area. The Indians did not surrender any part of their right to the use of Ahtanum Creek regardless of whether the Creek became the boundary or whether it flowed entirely within the reservation.[9]

This brings us to a discussion of the question of quantum of waters reserved. It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable. This matter was directly passed upon in Conrad Inv. Co. v. United States, 9 Cir., 161 F. 829, decided shortly after the Winters decision. This court was there undertaking to follow and apply that decision. It said (p. 832): "What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of

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[9] The Winters case settled the proposition that the treaty's failure to use the word "irrigation" was without significance. As an indication as to what streams the treaty recognized as exclusively for the Indians, note the following treaty provision: "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and band of Indians. * * * " (Emphasis added.)

Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case." The trial court's decree in that case, which this court affirmed, enjoined the interference with a specified quantity of water presently diverted and used for the benefit of the Indians on the reservation. This was 1666 2/3 inches, but the decree contained a further provision to the effect that the Indians were to be protected in respect to their future increased needs. This portion of the trial court's decree was expressly approved by this court in the following language, (p. 835). "It is further objected that the decree of the Circuit Court provides that, whenever the needs and requirements of the complainant for the use of the waters of Birch creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the condi-

tions on the reservation at any time require such modification."

At the time of the making of the treaty construed in the Winters case, it is plain there was little or no irrigation then being carried on by the Indians. As the Supreme Court pointed out, until that time they were a nomadic people. As was suggested by this court when that case was here, the Indians "might not have known the exact meaning of the word 'irrigation' had it been used in the treaty." No one even thought in the Winters case that the rights of the Indians to the use of the water reserved should be limited to the quantities used at the date of the treaty. The implied reservation looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil.

It is plain from our decision in the Conrad Inv. Co. case, supra, that the paramount right of the Indians to the waters of Ahtanum creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation. Some effort is made here to assert that the reservation of waters for the benefit of the Indians must be limited to the amount or quantity actually used beneficially by the Indians within some period of time or within

what the court might find to be a reasonable time. Thus, it is argued that since at the time of the 1908 agreement the area of land on the reservation then under irrigation through the Indian ditches did not exceed some 1200 acres, that the rights of the Indians were limited by those needs.

This argument, as we shall later note, is used as the basis for a contention that the 1908 agreement adequately provided for all rights of the Indians, since their rights were limited to the use of this 1200 acres. Nothing in the Winters case or in any other decided case lends any support to such an argument. As indicated, exactly the contrary was held in the Conrad Inv. Co. case, supra. Between 1908 and 1915 the Indian Irrigation Service was engaged in the work of constructing and extending irrigation canals and ditches with headworks and means of diversion so that by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to approximately 5000 acres. Had there been no 1908 agreement, it seems plain that as of 1915 it would have to be said that the rights reserved in the treaty were rights to the use of water from this stream sufficient to supply the needs of this 5000 acres.

When the complaint in the Winters case was filed approximately 5000 acres of land were then being irrigated upon the Fort Belknap reservation. The waters

were diverted and distributed by means of a canal with a carrying capacity of 5000 inches of water, and such amount of water was required for the then needs and requirements of the Government and the Indians.[10] The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as completed in the year 1915 would take substantially all of the waters of Ahtanum Creek. It does not appear that the waters decreed to the Indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our Conrad Inv. Co. case, supra, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters case equaled the entire flow of the Milk River, the decree would have been no different.

United States v. Walker River Irr. Dist., 104 F. 2d 334, was another case in which this court applied the doctrine of the Winters case and recognized the right

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[10] See statement of facts, 143 F. 741.

of the Indians upon the reservation there involved, to the use of water to the extent reasonably necessary to supply their needs. The Walker River Indian reservation was an early one, initiated in 1859. At that time, as this court pointed out, the Indians "unskilled in the art of farming would necessarily make slow progress. * * * The extent to which the use of the stream might be necessary could only be demonstrated by experience." (p. 339) At any rate by 1886 some 1900 acres were under cultivation and at the time of the trial this area had not substantially increased and the number of Indians was not increasing. This court accepted the master's report and his estimate of the needs of the Government "as demonstrated by 70 years' experience," and made the recommended award for water sufficient to irrigate 2100 acres. It is unnecessary to consider whether, had there been no 1908 agreement, the rights of the government as trustee for the Indians would have been constantly growing ones in the years following 1915 had the irrigable area within the reservation continued to increase. It is sufficient for the purposes of this case to say that an adjudication of the rights of the United States in and to the waters of Ahtanum Creek as of 1915, would necessarily award the United States a right measured by the needs of the Indian irrigation project at that date.

The assertion that any reservation of waters for the

benefit of the Indians must be limited to the amount or quantity actually used beneficially within some period which the court might find to be a reasonable time, is accompanied by a suggestion that a reasonable time limitation would terminate in 1908. We find no basis for this. We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the government that Congress did not move with sufficient speed to appropriate the funds necessary to complete this irrigation system by 1908 rather than by 1915, or that the Government had thus lost or forfeited the rights reserved for the Indians.

We next notice the court's conclusion that a 1925 state court adjudication of the respective rights of the white landowners as between themselves to the 75 percent of the flow of Ahtanum Creek, which had been allotted to them in the 1908 agreement, was a proceeding "which binds the United States and bars any claim to that portion of the flow." This refers to the proceeding reviewed in In Re Water Rights in Ahtanum Creek, 139 Wash. 84, 245 P. 758. There the non-Indian, non-reservation users of waters from Ahtanum Creek procured an adjudication of their relative rights. The United States was not a party to that suit, although as the pretrial order recites, it had knowledge that the adjudication was proceeding and it had an opportunity to appear

therein but decided against it. It is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them. Federal Power Comm'n v. Oregon, 349 U. S. 435, 444.

This brings us to the crucial question in the case, the question of the validity and effect of the 1908 agreement.

On August 18, 1906, one David Munn, as plaintiff, filed in the Superior Court of Yakima County, Washington, a complaint against W. H. Redman and others. The complaint alleged that the plaintiff had rights to the waters of Ahtanum Creek; that the defendants named were wrongfully diverting water from the Creek, and prayed for an injunction against them. Redman was an employee of the United States and was an Indian Irrigation Service engineer. The Indian Service was then in the process of enlarging the irrigation ditches on the reservation. Redman was sued as an individual. With the approval of the Attorney General, the United States Attorney at Spokane, Washington, entered an appearance for Redman, not as attorney for the Government, but as attorney for Redman. The filing of this suit led to a considerable volume of correspondence between the United States Attorney and the Attorney General

and between the Secretary of of the Interior and the officials of the Indian Irrigation Service. Counsel for the plaintiff offered to dismiss the case if the United States would file a bill in equity to settle questions relating to rights to the waters of Ahtanum Creek. Such a bill in equity was prepared by the United States Attorney and approved by the Attorney General. For some reason not apparent from the record, it was not filed, [11] and in the latter part of October, 1907, the Superintendent of the Indian Agency was directed by the Commissioner of Indian Affairs to begin conferences with counsel who had filed the Munn suit to see if an adjustment of the rights to use of the water could be made out of court.

In the spring of 1908 Chief Engineer Code of the Indian Irrigation Service was directed to go to the reservation to confer with a committee of white water users for the purpose of bringing about a settlement of the rights to the use of the Ahtanum water. The upshot of this was the execution of the agreement dated May 9, 1908 between the United States, acting through Code and a large number of named white users of water from Ahtanum Creek on lands located outside the reservation. The gist of the agreement was in its article I reading as follows: "The party of the first part agrees

[11] On August 8, 1907, the Secretary of the Interior requested a copy of the bill. This was furnished by the Attorney General on August 10. Two days later, on August 12, the Attorney General wired the United States Attorney in Spokane telling him not to file the bill until further notice.

to limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five percent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named." The remainder of the agreement dealt with methods of measuring the water in the creek, the manner of diversion, the installation of headgates and the designation of a ditch master. It was signed by Code on behalf of the United States and by the attorneys in fact for the white landowners, and on June 30, 1908 it was approved by Frank Pierce, First Assistant Secretary of the Interior. [11a]

[11a] The record contains copies of the official correspondence within the Interior Department and between that Department and the Department of Justice relating to the negotiations which led to the execution of this agreement. In the fall of 1907 Mr. Code transmitted to the Secretary a report of his investigation on the reservation and of his views concerning a possible compromise of claims respecting waters of Ahtanum Creek. His recommendation was a compromise agreement involving a division of the waters based upon the relative areas then actually irrigated by the Indians on the south side and the white settlers on the north. He estimated that at that time 1500 acres were irrigated on the Indian side and 5500 acres on the white side, and he recommended an attempt to adjust on the basis of one-third of the waters to the Indians and two-thirds to the white settlers. He referred to the "recent Montana decisions" and commented upon the possibility they would be sustained by the Supreme Court, but stated, "to a layman, it seems that, as between the early white settlers, who have made prior and beneficial use of the waters of a boundary stream and the

While the execution of the agreement led to the dismissal of the Munn case and dispensed with efforts for the time being to prepare and file a suit on behalf of the United States to settle the water rights, the execution of the agreement did not serve to lay the whole matter at rest, for as we shall hereafter note, arguments with respect to the agreement and its validity, and with respect to whether the parties thereto were or were not complying therewith, continued to rage for the next 30 years. [12]

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Government, which as guardian of the Indians' water rights, had not done so, the latter would be the party to make restitution to the Indians."

It does not appear that the Code agreement was submitted to any law officers of the Government for an opinion with respect to its validity prior to its execution and approval. In contrast with his layman's opinion as to the law, the attorney who represented the white landowners in dealing with Code, later testified: "I advised my clients that the Indian land was entitled to sufficient water to irrigate it. We tried to make the best bargain we could with the Secretary of the Interior, and we did." Senate Document 337, 63d Cong., 2nd Sess., Dec. 20, 1913, p. 117.

[12] In the year 1912 individual Yakima Indians began writing to the Attorney General urging the institution of a suit to determine the rights of the Indians both in the Yakima River and in Ahtanum Creek. They asserted that the agreement mentioned limiting the Indians to one-fourth of the Ahtanum Creek and the other agreement limiting the Indians to 147 cubic feet of water from the Yakima River amounted to robbery of the Indians and was "damn shame defendants stealing from poor Indians." The matter was referred by the Attorney General to the Secretary of the Interior who recommended that court proceedings should not be instituted because there was pending in Congress a bill which, if passed, "will restore to the Yakima Indians the water rights to which they are entitled under the Treaty of 1859." (Attached was correspondence relating to a prior Secretary's limitation of the Indian rights in the Yakima

River which the Secretary states was "less than the Indians are fairly entitled to and reasonably need.")

That material, and the proposed bill did not refer to the Ahtanum waters. A Department of Justice memorandum signed "C.S.E.." recites, "I have gone into this matter with considerable care and am impressed with the legal soundness of the argument presented by the Yakima Indians, but the Interior Department is responsible for whatever action detrimental to their rights has been taken * * * " The Indians were advised that no proceedings would be instituted at that time.

On November 2, 1918, the Superintendent on the Yakima reservation advised the Commissioner of Indian Affairs that white users along the Ahtanum were not living up to their side of the agreement of 1908; that control works and measuring devices as required by that agreement had not been provided by the whites, and the superintendent understood that he was not obliged to live up to the agreement either since the white users had failed to comply.

In 1923, the Chief Engineer in charge of Indian Irrigation recommended to the Commissioner consideration of an action to adjudicate the rights in Ahtanum Creek. Further petitions requesting an adjudication were received from the Indians and on July 5, 1927, the then Commissioner of Indian Affairs wrote to the Superintendent of the reservation referring to the decision of the court in the Winters case and to the Code agreement of 1908, and stated: "However, the provisions in that agreement were never observed or carried out and since that agreement was in its inception nothing more than a tentative understanding for use until such time as the disputed water rights might be determined by the court, and in view of the failure of the parties to observe its provisions, this ofice regards said agreement as of no effect whatever in the matter of determining the water rights to which the Indians are entitled." The superintendent was directed to see that the Indians received the quantity of water which they needed. This order was suspended at the request of Senator Jones of Washington, but there ensued and continued for several years thereafter extensive correspondence between the Ahtanum Irrigation District and the state Supervisor of Hydraulics of Olympia, Washington, on the one hand, and the Department of the Interior and Commissioner of Indian Affairs, on the other, respecting alleged excess diversions of the waters of Ahtanum Creek, and suggesting that the Secretary of the Interior undertake to investigate with a view to a settlement of he continuing pending dispute.

The correspondence shows that the white users constructed a dam across Ahtanum Creek; that this was torn out by the Indian Bureau and Indian police stationed to prevent its replacement. This matter was called to the attention of the Attorney General by First Assistant Secretary of the Interior Dixon by letter dated January 25, 1930. The Attorney General was advised that there was need for immediate action, and an investigation was asked. The Attorney General had an investigation made by the Federal Bureau of Investigation and on December 30, 1930, he transmitted the report of the investigation to the Secretary of the Interior. Attached to the report was a copy of a letter from the Solicitor for the Interior Department dated June 7, 1929, addressed to the Secretary, and expressing the view that the Code agreement of 1908 was valid and within the authority of the Secretary of the Interior to execute. The letter of transmittal, signed by Attorney General William D. Mitchell, stated: "I am not aware of any authority authorizing the Secretary of the Interior or any officials of the Government under him to enter into a compromise settlement of controversies such as are here mentioned, whether the same be effected as a compromise of a suit or otherwise."

On May 12, 1931, First Assistant Secretary Dixon wrote to the Attorney General that none of the parties would be satisfied until a court decision in the matter in dispute had been rendered, and requested the Attorney General to institute a suit to quiet title to the waters of Ahtanum Creek. The Attorney General directed the United State Attorney at Spokane to prepare a bill of complaint for that purpose. There followed telegrams from Senator Jones to the President stating that it was imperative that orders be issued stopping any judicial proceeding and transmitting a copy of a telegram from the Secretary of the Ahtanum Irrigation District advising that matters had been adjusted for the current season. The Secretary of the Interior, being advised that a working agreement had been reached respecting the water for the season of 1932, recommended that the institution of the suit to adjudicate the rights be delayed.

On October 2, 1933, Secretary of the Interior Ickes requested the Attorney General to proceed with the suit to settle the conflict over the Ahtanum Creek water rights. Washington Senator Dill wired the Commissionor of Indian Affairs suggesting that the proposed suit be called off, and transmitted a copy of the letter to him from the Secretary of the Ahtanum Irrigation District urging such non-action.

In June, 1938, United States Attorney Driver requested authority to institute a suit to adjudicate the rights to the use of water of Ahtanum Creek. This was followed by his sub-

This brings us to the heart of this case and the primary question involved, namely the problem of the validity of the 1908 agreement. This is a most difficult question. The Code agreement is one practically without precedent. [13] No statute, executive order or departmental regulation made any provision for that sort of thing. There is no long continued practice in the executive department of the Government from which congressional acquiescence could be spelled out. [14] Nothing can be found in the way of an established usage, "which constituted the common law of the department and fixed the duties of those engaged in its activities." United States v. Birdsall, 233 U. S. 223, 231. The agreement was approved by the First Assistant Secretary of the Interior. Nothing turns upon the fact that the approval

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mission of a proposed bill of complaint for this purpose. There followed letters from the Secretary of the Ahtanum Irrigation District to Senators Schwellenbach and Bone urging them to take steps to prevent the institution of this suit. This letter was transmitted by the Senators to the Attorney General.

By Senate Resolution dated July 18, 1939, the Attorney General was requested to stay these proceedings until the Secretary of the Interior could report on the feasibility of supplementing the supply of water in Ahtanum Valley. The Secretary of the Interior reported on July 21, 1942, pursuant to the Senate Resolution, that the proposed project to procure additional water was not feasible.

[13] The only prior instance of such an agreement on the part of the Secretary was that made by Secretary Hitchcock in 1905, agreeing to limit these Indians' right to Yakima River water. It is referred to infra.

[14] United States v. Midwest Oil Co., 236 U. S. 459, 469; cf. Sioux Tribe v. U. S., 316 U. S. 317 at p. 326.

was executed by an Assistant Secretary rather than by the Secretary himself. Under like circumstances it has been held that the act of an Assistant Secretary must be presumed to be within the scope of the authority which the Secretary conferred upon his Assistant. Parish v. United States, 100 U. S. 500, 504; United States v. Peralta, 19 How. 343, 347; Norris v. United States, 257 U. S. 77, 81, 82 [15] In inquiring whether the Secretary of the Interior himself had power or authority to enter into such an agreement, it is noted that at that time, the powers granted to the Secretary of the Interior, so far as Indians and Indian rights were concerned, were stated in very general terms, as follows:

> "Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third. the Indians." (R.S. 441, see 5 U. S. C. A. 485.)
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> "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations." (R.S. 463, now 25 U. S. C. A. 2.) [16]

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[15] Provision for an Assistant Secretary of the Interior and of his performance of duties prescribed by the Secretary, was made in R. S. §§ 438, 439 (1873). 23 Stat. 497 (1885) provided for a First Assistant Secretary.

[16] Appellees have cited as statutes having a bearing upon the authority of the Secretary to execute this agreement, Title 25 U. S. C. A. §§ 381 and 382. § 381, authorizing the Secretary to prescribe rules and regulations "necessary to secure a just and equal distribution [of water] among the Indians residing upon any such reservations," refers to regulations for distribution among the Indians themselves. See United

It is suggested that whatever may have been the initial force and effect of the 1908 agreement, that subsequent official acquiesence in the agreement and the performance thereof, and administrative interpretations of the applicable statutes as giving the Secretary power to approve the agreement, operated in some manner to ratify the arrangement. It is contended that the contemporaneous construction of the applicable statutes by those charged with the execution thereof, especially when it has long prevailed, is entitled to great weight.

A thorough search of the reports made to Congress by the committees dealing with appropriation of the funds which were used between the years 1908 and 1915 in completing the irrigation system designed to provide the 5000 acres with waters from Ahtanum Creek, fails to disclose any real evidence that Congress was reliably informed of this limiting agreement of 1908. If anything, the continued appropriations for such a sizeable irrigation system would suggest a lack of information on the part of Congress as to the 1908 agreement. So far as Congress is concerned, there is no evidence whatever that the members thereof had any information from the Department of the Interior with respect to this particular agreement prior to the

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States v. Powers, 305 U. S. 527. § 382 did not become effective until 1909 and it appears to provide merely for the irrigation of Indian lands in connection with projects undertaken under the Reclamation Act.

year 1932 when a bill was introduced for the purpose of approving and ratifying the agreement.[17] This was a bill introduced by Senator Jones of Washington entitled "A Bill Approving and Confirming Contract For Apportionment of Waters of Ahtanum Creek, Washington, Between Yakima Indian Reservation And Lands North Thereof Dated May 9, 1908." Extensive hearings were held but the bill had rough going[18] and was not reported.

In 1905 Secretary of the Interior Hitchcock had undertaken to make an agreement limiting the rights of this same tribe of Indians to waters flowing in the

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[17] Hearing before the Committee on Indian Affairs, U. S. Sen., 72nd Cong., 1st Sess., on S. 3998, (erroneously called S. 3988). Some of the witnesses at the hearings before the Joint Congressional Commission which investigated Secretary Hitchcock's apportionment of Yakima River waters mentioned the Ahtanum agreement. Neither that investigation nor the report which followed dealt with the Ahtanum agreement. Report of Joint Congressional Commission, Document No. 337, 63d Cong., 2nd Sess.

[18] "Senator Wheeler. Did the Indians agree to such a division at that time? Senator Jones. I do not think they did—that is, individually. I do not think they had a council. They acted through the Secretary of the Interior." Senator Wheeler. "If they did not have a council, Senator, my contention has always been that the Secretary of the Interior and the Indian Bureau had no right to go ahead and act arbitrarily without the tribal council's consent, taking away water or land from these Indians and giving it to white settlers.* * * The agreement, so far as I am concerned, has no force or effect." Hearings, (supra note 17) pp. 18, 20. J. Henry Scattergood, Assistant Commissioner of Indian Affairs, appeared at the request of the committee and expressed his personal view, contrary to that of the Secretary, that the bill should not pass but that suit to determine the rights should be started by the Attorney General, (p. 48).

Yakima River, and which were used on another portion of the same reservation. The Secretary undertook to limit the Indians' rights to 147 cubic feet per second. In 1913 a joint commission of the Senate and House visited that area and held hearings with respect to that agreement and to consider action designed to correct the wrongs claimed to have been done the Indians by the Secretary's agreement. The commission had before it a proposal to provide by congressional action additional water for irrigating these lands, known as the Wapato project, an area adjoining the Yakima River. The report, (Document 337, footnote 11a, supra) was that the Secretary's allowance of 147 second feet for the use of the reservation lands "was when made and now is inadequate, inequitable, and unfair to said Indian Reservation." The result of that investigation was the passage of the Act of August 1, 1914, 38 Stat. 604, appropriating funds designed to provide in addition to the 147 cubic feet per second mentioned in the Secretary's stipulation, sufficient stored water to make an aggregate of at least 720 cubic feet per second, this to be in satisfaction of the rights of the Indians in the Yakima River. The Act recited that "the Indians ° ° ° have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled ° ° °" This congressional inquiry and the enactment was not concerned with the 1908 agreement,

or with the Ahtanum waters; it dealt solely with the Wapato project and Yakima River waters. The enactment added up to a congressional disapproval of Secretary Hitchcock's action.

With respect to the departmental interpretations of the question of the Secretary's power or authority to approve the 1908 agreement, the material referred to in footnote 12, supra, sufficiently indicates that there was no clear or definite determination by the Interior Department and such expression as the office of the Attorney General gave, questioned the validity of the 1908 agreement.

As early as 1885, the Attorney General advised the Secretary that the latter had no power to approve leases of Indian lands for grazing purposes. The opinion was based in part upon the provisions of what is now Title 25, § 177, prohibiting "purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians." (18 Ops. A.G. 235, 238.) While under date of June 7, 1929, Interior Solicitor Finney had advised the Secretary that "You would not now be justified in ignoring or attempting to repudiate the agreement entered into in 1908," yet as noted in footnote 12, supra, Attorney General Mitchell stated that he was not aware of any authority authorizing the Secretary of the Interior to enter into the arrangement mentioned. In addition to

the 1927 direction of the Commissioner of Indian Affairs to the Superintendent of the reservation to disregard the 1908 agreement as being of no effect whatever. Commissioner Rhodes on March 22, 1932, recommended an unfavorable report on the House counterpart of the Senate bill proposing to ratify and approve the 1908 agreement. He also stated the view of the Indian Service that the agreement was merely a temporary working understanding and not intended to be binding for the future as conditions changed. He referred to the pending drafting of a bill of complaint to adjudicate the questions involved, and thought that until the adjudication was complete there should be no effort to have Congress confirm the 1908 agreement.[19] While the then Secretary of the Interior thus ignored the Commissioner's recommendation, the succeeding Secretary of the Interior, on October 2, 1933, requested the Attorney General to proceed with the suit. (See note 12, supra.)

The record completely fails to support the contention of the appellees that there was any definite ad-

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[19] Notwithstanding this recommendation from the Commissioner, Secretary Wilbur on the same date stated to the House Committee, "Unless I am prevented by court action, I propose to adhere to the agreement of 1908." He stated he had no objection to the proposed legislation. His lengthy letter takes notice of a question relating to the validity of the 1908 agreement but in listing questions in dispute, notes only questions that "relate to the interpretation of the agreement rather than to its validity."

ministrative interpretation of the Acts relating to the powers of the Secretary to the effect that under them such an agreement was a valid one. Rather it would appear the question was one under constant debate and dispute within the Department itself.

Of course, if the Secretary lacked the power to approve the 1908 agreement in the first place, neither he nor any of his subordinates could by subsequent conduct or approval, or by any action or failure to act, render valid that which was initially void. No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses. Utah Pawer and Light Co. v. United States, 243 U. S. 389, 408-9; Cramer v. United States, 261 U. S. 219, 234; United States v. Walker River Irr. Dist., supra, p. 339. "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularaly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." United States v. California, 332 U. S. 19, 40. And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may

not be lost through adverse possession, laches or delay. This, as pointed out, in United States v. 7,405.3 Acres of Land, 4 cir., 97 F. 2d 417, 422, arises out of the provisions of Title 25, U. S. C. A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention. [20]

It is thus apparent that we are confronted with the necessity of passing upon the question whether the applicable statutes above quoted, by force of their own terms alone, and unaided by any established practice, or administrative ruling, regulation or interpretation from which acquiesence or implied approval by Congress might be implied, granted the Secretary power to make this agreement. The outcome of this suit is dependent upon our answer to that question.

The Government's contention is that the Secretary had no power to agree to hand over to others 75 percent of the waters actually reserved for the use of the Indians, in the absence of specific statutory authority

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[20] So far as the Ahtanum Irrigation District is concerned, the considerations which would ordinarily induce a court to be sympathetic to a plea of laches would not have full force here. While the record shows that in 1907, counsel for plaintiff Munn offered to dismiss that suit if the United States Attorney would file a bill on behalf of the United States, yet on later occasions when the filing of such a suit was proposed some of the Washington Senators were repeatedly induced by the District to intervene with the Department of Justice to urge that no suit be brought to adjudicate the water rights. Delay was not chargeable solely to the Government officials.

so to do. There are cases which seem to point in that direction. Speaking of lands reserved by treaty for use of an Indian tribe, in Sioux Tribe v. U. S., 316 U. S. 317, 326, the Court said: "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to congressional delegation of its authority." It has been said that the Secreary's power to dispose of public lands must be found in specific, not in general legislation relating to public lands as a whole. Hynes v. Grimes Packing Co., 337 U. S. 86, 109. A similarly strict view with respect to the Secretary's power to deal with the property rights of individual Indians has been expressed. [21]

Neither of the sections of the quoted statutes relating to the powers of the Secretary makes any reference to agreements with respect to division of waters of streams bordering Indian reservations as between the Indians and the white settlers. The sections do in general language confer upon the Secretary powers of supervision and of management. R.S. 441 charges the Secretary with the supervision of public business relating

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[21] "Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory." Cramer v. United States, 261 U. S. 219, 234. Cf. Arenas v. United States, 322 U. S. 419.

to Indians, and R.S. 463 states that the Commissioner of Indian Affairs under the Secretary's direction shall "have the management of all Indian affairs, and of all matters arising out of Indian relations."

It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other. The management of any parcel of land necessarily involves some degree of occasional adjustment of the rights of the owner in relation to and concerning adjoining landowners; arrangements for the location and erection of boundary fences, and repair and maintenance of those fences are illustrations of this. More specifically we have here the case of a stream which formed the boundary between the Indian reservation and the outside public lands, and which public lands were open to entry by white settlers. The rights of the white settlers to the use of the waters were subordinate to the rights of the Indians, but they were not nonexistent. Until the Indians were able to make use of the waters there was no legal obstacle to the use of those waters by the white settlers. And after the Indian irrigation works were completed, there would still be the right of the non-Indian appropriators to make use

of any surplus available within the stream. Where the waters of a stream are subject to use by different landowners, the very use itself involves some accommodation between the parties. It is common knowledge that, particulary in the early days, many streams in the West were used by appropriators or by riparian owners long before the stream rights had been adjudicated, and prior to the establishment of any machinery for the appointment of water masters. That sort of thing involves a measure of dealing between water users. Authority to manage property would normally comprehend dealings of this character.

At the time the 1908 agreement was made, disputes had begun to appear as to the proper division and distribution of the waters of Ahtanum Creek. Of course it was then open to the United States, although not to the white landowners, to start court proceedings designed to adjudicate the rights of the litigants. It is the view of this court that it could not have been within the contemplation of Congress that the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream. As early as 1833, the Supreme Court said in United States v. Macdaniel, 7 Pet. 1, 13-14:

"A practical knowledge of the action of any

> one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provision for everything he does. No government could be administered on such principle. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers; there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

This principle has frequently been expressed in relation to the acts of the Secretary of Interior or the Commissioner of Indian Affairs. Thus in Rainbow v. Young, 8 cir., 161 F. 835, 838, the court speaking through Circuit Judge Van Devanter, after citing United States v. Macdaniel, supra, said:

> "In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, ° ° ° to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage. And, while there is no specific provision relating to the exclusion of

> collectors from Indian Agencies at times when payments are being made to the Indians, it does not follow that the commissioner is without authority to exclude them. * * *"[22]

If, as we believe, it was appropriate and within the general powers granted, for the Secretary of the Interior to enter into a working arrangement as to how the waters of Ahtanum Creek were to be handled and distributed, between the Indians on the one hand, and the white settlers on the other, the question arises whether the agreement made for this purpose becomes void and must be said to be beyond the powers of the Secretary if the arrangement made turns out to be an improvident one so far as the Indians are concerned.

As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the Indians, not merely as those needs existed in 1908, but as they would be measured in 1915, when the In-

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[22] "We do not forget that historically and traditionally the Secretary of the Interior has been selected as the executive arm of the Government to execute the declared Congressional policy with the Indians. As such, he and his subordinates have the responsibility of discharging the obligation of the Government to its Indian wards, and in that respect, he is given wide discretionary powers to deal with the individual Indians who are dependent upon the Government for tutelage and protection * * * . In the discharge of these duties, he acts as supervisor, agent, guardian, and trustee of the Indians and his property, whether in the nature of lands or restricted funds." United States v. Anglin & Stevenson, 145 F. 2d 622, 628, 10th Cir., c.d. 324 U. S. 844.

dian ditch system had been completed. If we assume that this 1915 need extended to substantially all of the waters of Ahtanum Creek, then the question is whether, conceding that the Secretary had the power to make an agreement for some workable division, can it be said that he had the power to agree to give to the white settlers 75 percent of that which the Indians might need in 1915 and subsequent years?

The record here makes it plain that the only person who gave the proposed agreement any study was Engineer Code. The agreement was drawn and signed, not only without consulting the Indians, but without legal advice. His reference to the "recent Montana decisions" (see footnote 11, supra), shows that he knew of the Winters case. Whether he knew that the Supreme Court had affirmed the case on January 6 preceding execution of the agreement, does not appear. It seems likely that the force and broad reach of that decision was not realized by Mr. Code or any one else in the Interior Department at that date. (See footnote 11a, supra.)

With an opportunity to study the history of the Winters rule, as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians. Perhaps the feature of the whole matter most

worthy of criticism is the apparent failure of the Secretary, before approving such an arrangement, to obtain legal advice either from the Solicitor or from the Department of Justice, as to the validity or the advisability of the proposed agreement. Viewing this contract as an improvident disposal of three-fourths of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and the Indian tribes. That history largely supports the statement: "From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians. [23]

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[23] Quotation is from an article on "The Raid on the Reservations" by Dorothy Van de Mark, Harper's Magazine, March, 1956, (Vol. 212, No. 1270). The author sketches the history of our dealings with the Indians, illustrating with references to such examples as the Indian Removal Act (4 Stat. 411), the successive removals of the Cherokees from lands coveted by the white man, and what happened to the reservations under the General Allotment Act of 1887. Another illustration of this same pattern of giving the Indian the short end of the stick is found in the way in which Indian timber is sold for less than market prices, recently commented upon in Squier v. Capoeman, 351 U. S. 1, 4, (footnote 7).

Because it has long been the law that there are few rights granted by treaty to Indians which Congress is obliged to respect, Lone Wolf v. Hitchcock, 187 U. S. 553, the general

The numerous sanctimonious expressions to be found in the acts of Congress, the statement of public officials, [24] and the opinions of courts respecting "the generous and protective spirit which the United States properly feels toward its Indian wards," Oklahoma Tax

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Allotment Act of February 8, 1887, 25 U. S. C. A. 331, was not open to challenge in the courts, and hence the Indians were obliged to accept allotments so small that livestock farming was impractical and the Indians often reduced to leasing the allotments to non-Indians. The so-called surplus unallotted lands were thrown open to white settlers and sold at nominal prices. (See for example, 33 Stat. 302, relating to the Flathead Reservation.) When a particular allotment happened to be valuable, the Secretary refused to convey it. Arenas v. United States, supra. The allotments originally required to be held in trust were in a multitude of cases caused to be patented in fee to the Indians who proceeded to sell or mortgage them and thus lose them to the white owners, a process which goes forward to this day. (For instance see Laws of 84th Cong., 2nd Sess., Chap. 107, Public Law 450, approved March 29, 1956; Public Law 539 of the same Congress, Chap. 326, approved May 28, 1956.) Sometimes the courts have been able to block some of the more flagrant consequences of this practice. See Glacier County, Mont. v. United States, 9 Cir., 99 F. 2d 733; Ward v. Love County, 253 U. S. 17.

[24] Governor Stevens to the Yakimas, May 30, 1855: "The Great Father has learned much of you * * *. I went back to the Great Father last year to say that you had been good, you had been kind, he must do something for you * * *. The Great Father said I want them to have more and larger farms; I told him you had cattle and horses; he answered that he wanted your horses and cattle to increase; * * * Why did the Great Father answer in this way? Why did he send my brother and myself here this day, to say this to you? Because you are his children; his red children are as dear to him as his white children * * *."

Section 3, Indian Removal Act, supra: * * * it should and may be lawful for the President solemnly to assure the tribe * * * that the United States will forever secure and guarantee to them * * * the country so exchanged with them * * *."

Comm'n. v. United States, 319 U. S. 598, 607, and the "high standards for fair dealing required of the United States in controlling Indan affairs," United States v. Tillamooks, 329 U. S. 40, 47, are but demonstrations of a gross national hypocrisy.

But we are constrained to hold that since some arrangement for the apportionment of the Ahtanum waters was the sort of thing which the Secretary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement. The Secretary's mistakes, his poor judgment, his overlooking or ignoring of the true measure of the Indians' rights, his lack of bargaining skill or determination may add up to an abuse of his power, but do not negative it, or make his act ultra vires.

The most serious argument against our construction of the statute as granting the Secretary of the Interior the right to make this contract which took away three-fourths of the Indians' water rights, is to be found in the necessary consequences of our holding. In Shoshone Tribe v. United States, 299 U. S. 476, the Commissioner of Indian Affairs in 1878 agreed to permit and permitted intruding members of the Arapahoe tribe to move upon a portion of the Shoshone Indian reservation which by treaty had been reserved for the Shoshone tribe. Thereafter the Commissioner continued

to rule and act on the assumption that the occupancy of the Arapahoes, who had been brought in with a show of military force on the part of the Government, was permanent and rightful. Subsequent recognition of the occupancy of the Arapahoes was ratified by act of Congress. It was held that this chain of events amounted to a taking or an appropriation of the rights of the Shoshone tribe as of the 1878 action of the Commissioner. The court said (p. 497): "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exercised in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U. S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation ° ° °; for that "would not be an exercise of guardianship, but an act of confiscation." ' " Here, as we have noted, Congress has never ratified the act of the Secretary in giving the Ahtanum waters to the white settlers. Of course, our holding that the Secretary acted within his powers means that we are giving to his conduct in this regard the same characteristics as an "act of confiscation" as

that which was found to have been accomplished in Shoshone Tribe v. United States, supra. [25]

It is clear that the action of the district court in dismissing the appellant's suit was error. The suit, like other proceedings designed to procure an adjudication of water rights, was in its purpose and effect one to quiet title to realty. Rickey Land & Cattle Co. v. Miller & Lux, 9 cir., 152 F. 11, 15, affirmed 218 U. S. 258. It presented claims and issues which required the court to determine and adjudicate the extent of the rights of the parties with respect to the waters of the stream; a determination of the validity of the 1908 agreement did not call for the trial court's conclusion that the United States had no interest whatever in the Ahtanum waters.

Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims of right to the use of the waters of the stream. Reynolds v. Schmidt, 10 cir., 40 F. 2d 238, 240. In general they did not do so. [26] Thus the answer of Ahtanum Irrigation District

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[25] This suit was filed July 2, 1947. The record shows that on July 24, 1951, a few days before the expiration of the time limited in § 12 of the Act of Aug. 13, 1946 (25 U. S. C. A. 70k) the Yakima Tribe filed a claim based on the 1908 agreement, with the Indian Claims Commission.

[26] An exception was the answer of the Corporation of the Catholic Bishop.

and of "the above named defendant landowners, water users, lienholders and encumbrancers whose lands lie within the boundary of said district," is wholly uninformative as to who these water users are, what lands they claim to have the right to irrigate, or how they deraign their titles to any water rights. In addition to admitting and denying certain allegations of the complaint, this answer contains only (1), a plea of laches on the part of the Indians; (2), a plea of the statute of limitations as against the owners of Indian lands patented in fee simple; (3), allegations as to the execution and validity of the 1908 agreement; (4), the allegation that the waters in the creek are insufficient to irrigate both sides thereof; and (5), the allegation that the reservation lands could obtain water supplies from other sources in the Indian reservation without excessive cost. The sufficiency of these answers was challenged by the United States in the pretrial statement. Since the cause must be remanded for further proceedings in the trial court, and since those proceedings must determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles, it is apparent that proper and appropriate answers must be required from all defendants. Although a pretrial order was made, it wholly failed to correct or deal with this insufficiency of the answers.

The opinion of the trial court found fault with the Government's proof of its water rights, saying: "Since the government cannot recover upon a claim of right of the Yakima Indian nation as an entity, but only as the trustee for several individual Indians who hold trust patents respectively, the claim of each respective owner must be specifically set up and proved, and further there must be proof of acts of some defendant or defendants which interfere with the trust owners of particular pieces of property, before the government can require any landowner north of the boundary to plead or prove his claim to ownership of a water right." With this we disagree. By maps and Indian Office records the United States showed the location, point of diversion and capacity of each ditch constructed by Indians, or by the Indian Service, and the description, irrigable area and location of all reservation lands served by those ditches with water from Ahtanum Creek. Also shown are the rate of progress through the years since the creation of the treaty in getting this water upon these lands. Just which lands are Indian owned, whether under trust fee patent, and which are owned by successors of Indian allottees, also was proven. The quantities of water required by these lands was both stipulated and proven. No more was required, for the United States has the right to make distribution of its waters under such rules as it may adopt, as provided by 25 U. S. C. A. 381, (note

16, supra). It is no concern of ours which particular parcels or allotments are served by the Indian Service ditches, so long as adequate proof was made of their aggregate needs.

It is important that we bear in mind just how the defendants here must deraign their water rights. The record indicates, as we have noted, that the bulk of the waters flowing in Ahtanum Creek would be required for the irrigation of the lands on the reservation which were susceptible of service through the Indian irrigation system completed in 1915. The right to the use of that quantity of water was for the reasons previously indicated originally the exclusive property of the United States as trustee for the Indian tribe. No portion of that volume of water or of the right to the use thereof, was open to appropriaion or other acquisition under state law by the defendants or their predecessors in interest. United States v. McIntyre, 9 cir., 101 F. 2d 650, 653-4; cf. Federal Power Comm'n. v. Oregon, 349 U. S. 435. To the extent that the defendants are to be permitted to have any part of the use of that portion of the flow of the stream, their rights are deraigned from the agreement of 1908. Apart from that agreement, those defendants would have no right to the use of any of said waters except in strict subordination of the prior and better rights of the United States as trustee for the Indians. Of course, as between themselves, they could

acquire priorities under state law in respect to their use of the surplus after the interest of the Indians had been satisfied but in relation to that surplus only.

Again the 1908 agreement was not made between Engineer Code on the one hand and all citizens of the state of Washington on the other. The agreement was made with specified individuals, and since it related to the use of water, certain qualifications must necessarily be treated as implied conditions thereof. It seems plain that if this, as other agreements relating to Indian rights, is to be construed most strongly in favor of the Indians, it must be understood that the right to the use of the 75 percent of the waters must have been limited to the needs as of 1908 of the particular individuals who were parties to the agreement.

In the case of Benton v. Johncox, 17 Wash. 277, 49 P. 495, the Supreme Court of Washington, in a suit between non-Indian users of water of this same Ahtanum Creek, held that the riparian owners of land upon the stream were entitled to an injunction restraining the non-riparian owners from diverting or interfering with the water of the stream; this on the theory that the common law as expounded in Lux v. Haggin, 69 Cal. 255, 10 P. 674, 753, was the law of Washington at the time when the ownership of these riparian owners was first initiated. But whether the beneficiaries of the 1908 agreement were dealing as riparian proprietors,

or were confined to such owners, or whether owners of appropriative rights were included, their interests as of 1908 were necessarily limited to their then needs, and subsequent uses or ownerships could not enlarge their rights under the arrangement for the division of these waters.

We hold that at any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater. This follows from the proposition that it is a fundamental maxim of the law of waters that an individual's rights, no matter how measured or described, can never exceed his needs. Vineyard Land & Stock Co. v. Twin Falls, etc., Co., 9 cir., 245 F. 9, 22. It follows also from the general principle that an agreement of the character of that executed in 1908, must be construed as reserving to the Indians, who previously owned substantially all of the waters, everything not clearly shown to have been granted.[27] What we have here referred to are neces-

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[27] The record indicates that there has from the beginning been a dispute as to whether the agreement applied prior to the season of low water, or in times of early high water. The records of flow in the Indian Irrigation Service main canal for the years 1911 through 1929 appear on page 49 of the Hearings mentioned in note 14, supra. They show a full head at the beginning of each season, that in some years the

sarily issues which must be determined by further proceedings in the trial court, and the parties should be required by pleading or pretrial agreements to frame such issues for trial.

Another issue raised by the United States in the pre-trial order was that the defendants in the use of their claimed 75 percent of the waters, were wasteful. Evidence to this effect was offered and received at the trial. It tended to show irrigation water diverted by the defendants permitted to run to waste upon highways, diverted through open channels with no headgates or measuring devices, old river beds and sloughs used in place of ditches, and the like. The court never reached that issue of course for it dismissed the complaint in its entirety. Waste of irrigation water is not to be tolerated and in arriving at a determination of the rights and needs of the defendants, the court must take into consideration the question of wasteful practices alleged to have been carried on by the defendants. In a case of this character an injunction against such waste is an appropriate part of the decree if the facts developed disclose a need for it. Campbell v. Grimes, 62 Kan. 503, 64 P. 62. If waste cannot otherwise be prevented, a

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head was never cut to 25 percent, in a few it was so cut for only a few days, while in most years it wascut to 50 percent in midseason. The claims of the parties in respect to this dispute are for adjudication by the trial court in the light of its determination of the needs of the parties and the other circumstances of the case.

court may restrain a party from using any water until his waste is averted. Glaze v. Frost, 44 Ore. 29, 74 P. 336.

Another issue raised by the United States in the pretrial order is that the defendants have sunk numerous wells by which an additional draft has been made upon the available physical supply of water within the watershed. This is claimed to be to the detriment of the United States.

In the process of making a complete adjudication of the rights of the parties it is appropriate for the court to inquire into the question of compliance by the defendants not only with the implied but with the express requirements of the agreement of May 9, 1908. That agreement contained provisions that the users of water of Ahtanum Creek must divert the same by substantial headgates equipped with suitable control appliances and with measuring devices. It would appear to be elementary that the court must condition diversion of Ahtanum Creek waters claimed under the 1908 agreement upon compliance with both the express and the implied conditions of that agreement.

It is thus noted that the record here lacks both the statements of claim, and the evidence necessary for determination of issues required to be decided for a complete adjudication of the rights of the parties in

this stream. For that reason we have no basis for a ruling upon appellee's motion for an injunction, and that application is denied.

The Government has not taken a definite stand in its argument here with respect to the rights of the so-called "Class Three Defendants," namely, the successors in interest of the original allottees to whom patents in fee were issued, describing lands under the Indian Irrigation ditch. The trial court in its finding No. 18 found that these patentees or their successors, had failed, for a period of more than ten years, to assert any rights to the 75 percent of the waters of the stream and had lost any rights thereto. These defendants claim that as successors to certain original Indian allottees for whom the waters were reserved and for the benefit of whose lands the Indian ditches were constructed, these defendants have acquired a vested interest in and a right to the distribution of the waters diverted by the United States to the same extent as if their lands were still in the possession of the original allottees. That they did originally acquire such a right through purchase of allotments seems clear from United States v. Powers, 305 U. S. 527. That case holds that white transferees of such fee patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters diverted for the Indian irrigation system.

The question remains whether those of them who had acquired such interest more than ten years prior to the institution of this suit are barred by statute of limitation or laches from now claiming any such participation in the benefits of the Government's irrigation system. We think that the answer is to be found in the fact that in any suit brought by any one or more of these Class Three efendants, against the other defendants here, the trustee holder of the water rights would be a necessary party. Cherry v. Howell, 2 cir., 66 F. 2d 713. And since the trustee, the United States, was not susceptible to suit, and could not be made a party defendant, the rights of those third party defendants cannot be said to be barred and that they are now entitled to participate rateably with the Indian beneficiaries in the use of such waters as may be decreed to the United States in this suit.

The judgment is reversed and the cause is remanded for further proceedings in the court below not inconsistent with this opinion.

CHAMBERS, Circuit Judge, concurring:

I concur. I do think that there may be unintended overtones in what Judge Pope says about the Interior Department, Assistant Secretary of the Interior Pierce and Chief Engineer Code which are a little harsh as to their conduct in 1908. I assume that the two men have departed from this vale and 48 years later they

cannot defend themselves. Even though they may have known of the Winters decision, those who have a duty to act today may make mistakes which, in the course of future events, may indicate bad judgment.

If the 1908 agreement today works a great injustice, I think that it is for the Congress to correct the unfairness if such there be by developing other irrigable land for the Indians involved. Therefore, I think it is right that we should uphold the agreement of 1908.

(Endorsed:) Opinion and Concurring Opinion. Filed July 10, 1956. Paul P. O'Brien, Clerk.

APPENDIX "D"
(R. 538-583)

UNITED STATES OF AMERICA,
*Appellant,*
v.
AHTANUM IRRIGATION DISTRICT,
a corporation, et al.,
*Defendants.*

No. 312

## REPORT OF SPECIAL MASTER

### PRELIMINARY

By this action, the plaintiff United States of America, as trustee of the Yakima Tribe of Indians, seeks to quiet title to the use of waters of Ahtanum Creek for lands on the Yakima Indian Reservation, now held by the Indians or their successors in interest. A previous trial resulted in a judgment of dismissal on the merits, the judgment being filed November 9, 1954. Plaintiff appealed to the United States Court of Appeals for the Ninth Circuit, which on July 10, 1956 reversed the judgment and remanded the cause for further proceedings not inconsistent with the Court's opinion.

This is an old and long continued fight, bitterly conducted down through the years as the farmers on both sides of Ahtanum Creek sought the water which meant life to their lands, from the inadequate supplies of the creek. In a letter to the Secretary of the Interior, dated April 28, 1908, W. H. Code, Chief Engineer of the Bureau of Indian Affairs, who a few days later was to sign the 1908 Agreement on behalf of the plaintiff,

characterized this controversy as " . . . one of the most complicated water situations I have ever encountered." (Plaintiffs Ex 79-160, page 103). Those who have dealt with the problem in its many later recurrences, would find little reason to amend that statement.

The second trial on the merits was an extended one, and the positions of the parties were vigorously and brilliantly presented. It is impossible, in this report, to cover every conceivable aspect of the case on all sides; I hope, however, that the process of reasoning on the decisive issues has been made clear, as an aid to court and counsel in later stages of the case. It would seem desirable that, if possible, reference be made to the material in the Order on Pre-Trial on the Merits, and to the briefs of the parties, in connection with the initial consideration of this report.

The opinion of the circuit court *(United States of America v. Ahtanum Irrigation District*, et al., 9 Cir. 236 F 2d 321) necessarily guides us in the second trial of this case. It is well, then, to refer to certain essential parts of that opinion, to clarify our present starting point:

1. The Treaty of 1855 between the United States and the Confederated Tribes of Yakima Indians, reserved to the Indians rights to the waters of Ahtanum Creek for future, as well as current use. By 1915, when

extensive irrigation works had been completed by the Indian Service, this reservation, if given full effect, would have meant that the Indians, needing and able to use substantially all of the water of Ahtanum Creek after the period of high run off, would have been entitled to it. Defendants would have had no rights to any Ahtanum water, except as to any surplus, and in subordination to the higher rights of the Indians. The decisions in *Winters v. United States,* 207 U. S. 564, and *Conrad Investment Co. v. United States,* 9 Cir. 161 F 829 lead to these conclusions.

(Defendants urge, in their opening brief, page 38, that this court re-examine and over-rule the Winters case. They quote recent law review comment critical of that decision. In view of the specific holding of the Court of Appeals, and its directions on remand, this court should uphold and apply the Winters case, rather than over-rule it.)

2. Defendants would have no right to the use of Ahtanum water needed by the Yakima Indians, unless they are given that right by the Memorandum of Agreement of May 9, 1908, between the United States, acting through Chief Engineer Code of the Indian Irrigation Service, and numerous landowners north of Ahtanum Creek, and outside the Yakima Indian Reservation. This agreement was approved by the First Assistant Secretary of the Interior, on June 30, 1908. The 1908 Agree-

ment is therefore the foundation of this case – unless it gives defendants rights superior to the plaintiff, they have none.

The Court of Appeals gave the 1908 Agreement its careful attenion, and, although criticizing it as improvident, upheld it as a valid exercise of the power of the Secretary of the Interior. This has not ended the controversy as to the Memorandum of Agreement of 1908. The parties in this second trial are at issue as to its validity, nature and effect, and this issue should be considered first.

## THE VALIDITY AND NATURE OF THE MEMORANDUM OF AGREEMENT OF MAY 9, 1908

Plaintiff asserts that the 1908 Agreement, even if within the power of the Secretary of the Interior, was a mere temporary working arrangement, terminable at will. Defendants consider it a contract and conveyance of the right to 75% of the waters of Ahtanum Creek. If it is in fact a temporary working arrangement, the defendants would have no rights, and plaintiff, being able to use substantially all the water of Ahtanum Creek (*United States v. Ahtanum Irrigation District et al,* 9 Cir. 236 F 2d 321 @ 325, 327; *Order on Pre-Trial on the Merits,* page 4) would be entitled to it.

It is recommended that the court uphold the Memorandum of Agreement of 1908 as a valid and effective

contract and conveyance, subject to a reservation to the Indians, as set forth in the *Opinion of the Court of Appeals,* 236 F 2d 321 @ 341. It is my belief that this conclusion follows necessarily from the Court of Appeals opinion.

Defendants, who urge that the Agreement constitutes a conveyance, assert that the Court of Appeals has determined its validity, but not its nature and effect. It is true that the Court of Appeals did not specifically discuss whether it constituted a conveyance. However, a reading of the opinion leads inevitably to the conclusion that the Court of Appeals considered the 1908 Agreement effective to deprive the Indians of water rights previously held, and to vest those rights in the land owners north of Ahtanum Creek (subject to certain limitations discussed later).

The Court of Appeals emphasized (p. 328 of its opinion) that it was considering the *validity* and *effect* of the 1908 Agreement. Later, (p. 336) it commented,

> " . . . It is the view of this court that it could not have been within the contemplation of Congress that the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream. . . . "

Again (. 337) appears this statement:

"With an opportunity to study the history of the Winters rule, as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, *improvidently bargained away extremely valuable rights belonging to the Indians.* . . . Viewing this contract as *an improvident disposal of three-fourths of that which justly belonged to the Indians,* it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and the Indian tribes . . . ."

On page 338, the court commented:

"The most serious argument against our construction of the statute as granting the Secretary of the Interior the right to make *this contract which took away three-fourths of the Indians' water rights,* is to be found in the necessary consequences of our holding. . . ."

On page 341 appears the following:

" . . . an agreement of the character of that executed in 1908 must be construed as reserving to the Indians, who *previously* owned all of the waters, everything not clearly shown to have been granted. . . ."

The concurring opinion (page 342) contains the following paragraph:

"*If the 1908 agreement today works a great injustice,* I think that it is for the Congress to correct the unfairness if such there be by developing other irrigable land for the Indians involved. Therefore I think it is right that we *should uphold the Agreement of 1908.*"

Emphasis in all the foregoing quotations have been supplied, and the quotations are, of course, out of context. However, they seem to typify the view of the Court of Appeals that permanent rights to the use of waters of Ahtanum Creek passed to the north side landowners.

The court characterized the action of the Secretary " . . . in giving the Ahtanum waters to the white settlers. . . " as an "act of confiscation," but clearly indicated its conviction that the action, however unjust, was effective. The court never used the term "temporary working arrangement" urged by plaintiff as the proper way to characterize the Agreement. It did refer to that as having been the view of the Indian Service *(Opinion, p. 333)*. It used the term "working arrangement" itself, but the very sentence in which it is used negatives the idea that it was to be temporary *(Opinion, p. 336, 337)*. If this were a temporary working agreement, the mere bringing of this action by the United States would invalidate it; and since defendants have no rights other than those based on the 1908 Agreement, the Court of Appeals could have decided the entire case for plaintiff, without the necessity for the long and expensive re-hearing which has followed the first appeal. Indeed, plaintiff's view that the 1908 Agreement is ineffective because of technical deficiencies (absence of words of grant, and of acknowledgement,

etc.) could similarly have been presented to the Court of Appeals, and if plaintiff's view were adopted, the entire case could have been disposed of then.

It is recognized that the "law of the case" doctrine is not upheld in federal courts as a rule of substantive law, but only a discretionary rule of practice. (*United States v. United States Smelting Co.*, 339 U. S. 186; *Lawler v. National Screen Service Corporation*, 352 U. S. 992) Nevertheless, the views of the Court of Appeals, so clearly expressed, should guide the District Court in these "further proceedings . . . not inconsistent with this opinion."

*Independent Analysis*

It is believed that an analysis completely independent of the Court of Appeal's opinion, would result in the same conclusion — that the Agreement of 1908 constitutes an effective conveyance of the rights to 75% of the waters of Ahtanum Creek (both natural and return flow).

The following views, on points controverted between the parties, support this conclusion. The statement will be brief because of the belief that the Court of Appeals has decided this issue.

1. Questions concerning real property, and the manner of its disposition, are governed by the law of the state where the property is located. *United States v.*

*Fox*, 94 U. S. 315; *United States v. Burnison*, 339 U. S. 87; *Woods v. Nainey*, 69 F 2d 892.

Under the laws of the state of Washington, and the law of real property generally, a deed does not have to follow a specific statutory form (*R. C. W. 64.04.060, 26 C J S Deeds #22*) nor contain any specific, particular words of grant.

2. The 1908 Agreement contains words of grant, each party " . . . surrendering and conceding to the other party all rights heretofore claimed. . . " in the natural flow of Ahtanum Creek, in excess of the percentage division agreed upon. This wording clearly imports a grant, a transfer of rights. *Evans v. United States*, 153 U. S. 584 @ 591; *Kessles v. Clayes*, 125 S W 799 @ 801; *Scurry v. Jones*, 4 W 468.

It might be mentioned that the conveyance was not of the corpus of water, but of water rights – of the right to a stated percentage of the natural flow of Ahtanum Creek, which right constituted an incorporeal hereditament. *Madison v. McNeal*, 171 W 669, 19 P 2d 97; *2 Kinney on Irrigation and Water Rights*, p. 1328, 1333, 1340.

3. The 1908 Agreement is not invalidated by any defect in acknowledgement.

Plaintiff asserts the certificates of acknowledgement of landowners north of Ahtanum Creek is faulty in

asserting that the *principal* acknowledged the instrument, whereas the *agents* signed it. If true, this would invalidate the acknowledgement. *29 A L R 985; 25 A L R 2d 1168.*

It is only necessary to read the acknowledgement, however, to conclude that the *agents*, not the *principal*, made it. This argument rests entirely upon the capitalization of one word. The acknowledgement reads as follows:

> "I, John H. Lynch, a Notary Public in and for said County and State, do hereby certify that personally appeared before me . . . (named individual agents) . . . personally known to me to be the individuals who executed the within and foregoing instrument of writing as attorneys in fact for and on behalf of . . . (named individual principals) . . . The principals named in said instrument, and each for himself and not one for the other, acknowledged to me, that he executed the same as the free and voluntary act and deed of the said principals and each of them, for the uses and purposes therein mentioned."

It was the agents who appeared before the notary public; it was the agents who signed the agreement; it was the agents who acknowledged they had signed it. The term "The principals" obviously describes the previously named principals for whom the agents signed.

It is asserted further that there is no acknowledgement of the signature of W. H. Code, Chief Irrigation Engineer, Indian Bureau, who signed for the United

States. He did, however, sign an attached "affidavit of disinterestedness," before the same notary public, in which he swore he made the contract personally, that he made it fairly and without benefit or advantage to himself, or allowing such benefit or advantage corruptly to any other person. This would appear to meet the definition of an acknowledgement as a public declaration by the grantor that the act evidenced by the instrument is his act and deed, *25 A L R 2d 1124 @ 1129.* Substantial compliance with statutes regarding acknowledgements is sufficient. *Brady v. Frigidaire Sales Corp.* 180 W 472, 40 P 2d 166. The policy of the courts has been to susttain acknowledgements whenever possible, as long as it is reasonably certain that the grantor made the acknowledgement in question. *25 A L R 2d 1124 @ 1133.*

An acknowledgement in affidavit form (as here) has been held sufficient, depending upon the particular wording. *First National Bank v. Devore,* 110 Ok. 283, 234 P 734; *Bownner v. Stroud Bros.,* 172 Ark. 569, 289 S W 766.

If it be considered, however, that the acknowledgement of either party is faulty, that would be of little moment in this case. An unacknowledged, or improperly acknowledged, deed is valid as between the parties. *Ockfen v. Ockfen,* 35 W 2d 439, 213 P 2d 614; *Fidelity & Casualty Co. v. Nichols,* 124 W 403, 214 P 820.

The United States brought this action; the United States executed the 1908 Agreement and was a grantor therein. It cannot now take advantage of any defect in acknowledgement of its conveyance.

4. Plaintiff argues that if any water rights were transferred away from the United States by the 1908 Agreement, they were mere personal rights, or easements in gross, which did not become appurtenant to any land, could not be transferred, and did not survive the original parties to the 1908 Agreement. This contention is based principally upon the fact that the 1908 Agreement did not contain any description of land upon which the water was to be used. What was conveyed, of course, was a water right, and that was definitely described, and clearly ascertainable. Did the failure to include land descriptions restrict this conveyance to a mere personal right or easement in gross? I do not think so. See *Osborn v. Chase,* 119 W 476, 205 P 844.

It is important to consider just what this Agreement was, and what it did. The United States, through Engineer Code, made this agreement not with all the citizens of the state of Washington, but with specified individuals. *United States v. Ahtanum Irrigation District,* 236 F 2d 321 @ 340. It is not, however, a series of separate agreements with specified individuals. It is one agreement with all the individuals, and the property rights conveyed were conveyed to all.

James Garfield, the Secretary of the Interior, stated in a letter of January 28, 1908:

> "It is surely to the best interests of all concerned that this matter be settled by agreement rather than as a result of litigation. The settlers will find, as I told them last summer, that the Indian office desires to meet them half way in effecting a fair settlement, but, as you will readily understand, it is quite impossible for the Government to attempt to deal individually with these settlers. . . "

The Special Powers of Attorney signed by north side landowners as a basis for the 1908 Agreement emphasize the nature of that agreement as an aggregate one. The following excerpts (Plaintiff's Ex 79-160, page 62) point this up:

> " . . . true and lawful attorneys to act jointly and not otherwise."

> " . . . and to finally settle all controversy between ourselves as a unit on one side, and said Government and Indians as a unit on the other side. . . "

> " . . . said attorneys in fact shall have no power to settle the right to use any of the waters that may be conceded to the white settlers, or to us, among ourselves."

> "The object of this Power of Attorney being to authorize a settlement as between us as a whole and the said Government and Indians whatsoever."

We do not have the situation of the owner of a specific tract of land conveying an undisputed water right to the owner of an adjacent tract. The agreement

was a compromise of conflicting claims to the use of water of Ahtanum Creek. The 1908 Agreement itself, in its preliminary statement, reads as follows: (Order of Pre-Trial on the Merits, page 37)

> "That Whereas the parties hereto claim certain quantities of water in the Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes; and Whereas, a dispute exists as to the extent of the respective rights of the said parties in and to said water,
> Now, Therefore, the parties hereto, in order to avoid litigation and in order to limit and define their said respective rights in and to the waters of the said Ahtanum Creek, do mutually covenant and agree as follows: . . . "

It now appears clear that the north side land owners claim was not as strong as the parties then seemed to think. Under the authority of the Winters case, by 1915 when the Ahtanum Indian Irrigation Project system was completed, plaintiff would have been entitled to substantially all the waters of Ahtanum Creek, after flood season, if the 1908 Agreement had not been executed. In 1908, however, the respective rights were in dispute, and they were settled, not as we have said, by a series of individual agreements, but by an agreement referring to "total and aggregate" percentages.

In 1908, and the years immediately preceding, moreover, there was a Surplus of water beyond the then needs of the Indians south of Ahtanum Creek, since the Indian Irrigation Project system would not be com-

pleted until 1915. As to that surplus, and as between themselves, the north side landowners could and did acquire priorities under state law, in subordination to the better rights of the United States as trustees for the Indians.

When the 1908 Agreement was made, the north side landowners did not assert their respective claims and rights as individuals. They agreed in this compromise of disputed claims, to limit and define their "total and aggregate claim" to 75% of the natural flow of Ahtanum Creek, and surrendered and conceded any claim to the rest, to plaintiff. Plaintiff, for its part limited and defined its claim (which, since it acted as trustee, was certainly aggregate in character) to 25%, and surrendered and conceded any claim to the rest, to the north side landowners, acting in the aggragate as "party of the second part."

The effect of this action was clearly not to convey specific percentages to specific landowners. It did drastically reduce the amount and percentage of Ahtanum water to which plaintiff would otherwise have been entitled. Moreover, by conveyance, it increased the "surplus" beyond the claims of the United States as trustee for the Indians, to which the respective rights of the north side landowners might apply. It was a surrender of rights to water in total and aggregate percentages to these land owners as a class, which only increased the

total amount of water to which their respective priorities acquired before or after under the laws of the State of Washington, would apply.

Defendants submitted a Memorandum of Authorities urging that as to the portion of the flow of Ahtanum Creek to be awarded the defendant north side water users, the law of the state of Washington and prior adjudications by the state of Washington control. This memorandum (with which I am in agreement) contains the following significant statement:

> "It is interesting to note that the Ninth Circuit's decision in no way invalidates the State Court Adjudication of water rights between or among the North Side water users. Its holding is limited to the statement that the Sate adjudication could not affect the waters of Ahtanum Creek belonging to the United States as trustee for the Indian tribe."

What has happened here, essentially, is that the United States, as trustee for the Yakima Indian Tribe, claimed water from Ahtanum Creek by virtue of the Yakima Indian Treaty of 1855. The north side landowners claimed water by virtue of riparian position and appropriation (although we now see their enforcible rights at the time were only as to the surplus over and above the water needed for the reservation lands). The disputed claims were compromised, each side limited its claim to a stated percentage, and surrendered to the other all right to the balance. As to the percentage

awarded the north side free from claim by the United States, it was allocated to specific lands and became appurtenant to those lands – not by virtue of the grant itself, but by virtue of appropriation under the laws of the state of Washington.

A limited agreement among users of water from a creek has been upheld, even without any words of grant. *United States v. West Side Irrigation Co.*, 230 F 284; *West Side Irrigation Co. v. United States* (CC 9) 246 F. 212. The operative part of the agreement in each case was that the party " . . . agrees to limit and does limit its respective right of appropriation from said Yakima river and its tributaries to the above specified amount." Both the district court and court of appeals for the 9th Circuit upheld such an agreement as a valid contract, based upon consideration. As Judge Rudkin said, in the case first cited above:

> "Furthermore, the purpose of this agreement was not to fix or establish existing rights, but to fix and prescribe the rights which the defendant company would have and exercise in the future. The defendant was under no obligation to sign the agreement or to relinquish any rights it might have, and the government was under no obligation to take up irrigation works in the Yakima Valley. Both parties, however, had or claimed rights in the waters of the river, and they undertook for reasons satisfactory to themselves, to compromise and settle these rights. This settlement and compromise was an adequate consideration for their agreement, and their course was in full accord with the policy of the law. Such

> an agreement should not be set aside except for cogent reasons established by clear and convincing proof."

It is obvious from the Court of Appeals opinion in this case (*U. S. v. Ahtanum Irrigation District*, 236 F 2d 321) that the court considered the water rights of the north side landowners were permanent ones subject, of course, to an implied reservation and were appurtenant to the various tracts of land. If these rights had been merely personal and non-transferable, the passage of time would have terminated most of them, and the directions of the Court of Appeals on the re-trial of this case would have been far different.

The Court's characterization of the act of the United States in making the 1908 Agreement, as an act of confiscation, its reference to the contract as taking away three-fourths of the Indian's water rights, its reference to the necessity for the present defendants to deraign their water rights, all negative the idea of a temporary, personal, non-transferable right. The court stated that "subsequent uses or ownerships" could not enlarge the 1908 rights, but never implied that a transfer of ownership would destroy those rights. We must conclude that the water rights of the north side landowners are permanent rights, appurtenant to the lands with which they are connected, even though those lands were not mentioned in the 1908 Agreement. Being appurtenant, the

water rights of the respective parties passed with conveyance of the lands to which they were appurtenant, in the absence of contrary provisions in the instrument of conveyance. *Zaine v. Linde*, 121 W. 472, 209 P. 1085; *Richland Irrigation District v. United States*, 222 F 2d 112.

## EFFECT OF THE MEMORANDUM OF AGREEMENT OF MAY 9, 1908

The Court of Appeals further set forth its views as to the effect of this agreement on various aspects of the present controversy. As in other respects, the parties are in almost complete disagreement as to how these directions of the Court of Appeals should be interpreted. Preliminary to a consideration of these controverted points, it seems necessary to discuss the nature of this case, and here again we find the parties in disagreement.

1. I believe that we are here seeking to effect an aggregate percentage division of Ahtanum waters between the plaintiff on the one hand, and the defendant north side land owners on the other, and determine at what level of flow it takes effect. This is not, as plaintiff asserts, a complete water adjudication, with the relative rights of each water user being determined against the rights of each other water user. It is true that we shall have to make a tract by tract analysis of the north

side lands to determine such things as need, and eligibility under the 1908 Agreement. This is done, however, in order to build up total figures. Just as the 1908 Agreement was a limitation of claim and a conveyance of gross percentages, so our determination here should be an aggregate percentage although based upon and built up from a succession of individual showings. This, I believe, is what the Court of Appeals meant in the following quotations from Page 339 of its opinion:

> "It is clear that the action of the district court in dismissing the appellant s suit was error. The suit, like other proceedings designed to procure an adjudication of water rights, was in its purpose and effect one to quiet title to realty. Rickey Land & Cattle Co. v. Miller & Lux, 9 cir., 152 F. 11, 15 affirmed 218 U. S. 258. It presented claims and issues which required the court to determine and adjudicate the extent of the rights of the parties with respect to the waters of the stream; a determination of the validity of the 1908 agreement did not call for the trial court's conclusion that the United States had no interest whatever in the Ahtanum waters."

> " . . . Since the cause must be remanded for further proceedings in the trial court, and since those proceedings must determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles, it is apparent that proper and appropriate answers must be required from all defendants. . . "

The Court of Appeals also (page 341) referred to " . . . the process of making a complete adjudication of the rights of the parties." Again, this seems to mean

the rights of the parties to this case – the rights of the plaintiff as against the defendants, and the right of the defendants as against the plaintiff, not the rights of the defendants as among themselves.

2. There has previously been a full water adjudication as among the north side landowners – the defendants in this case and their predecessors in interest. This was under Washington state law, and is set forth *In Re Ahtanum Creek*, 139 W 84, 245 P 758. The United States was not a party to that case, and it has previously been held that the United States is not bound by it (Tr 6364). The fact, therefore, that the state court considered 75% of the water of Ahtanum Creek to belong to the north side, does not bind the United States, or this court, in the present case. Nor does a specific award of water in that case prove need or use at the present time for our purposes.

As between the defendants themselves, however, and as to whatever quantity of water is finally allocated to them the decree in In Re Ahtanum (which is often referred to in the present case as the Achepol Decree) is valid and binding. No new adjudication of those rights as among themselves, should be attempted in this court.

It has previously been emphasized that the conveyance of water to the north side landowners in the

1908 Agreement merely increased the "surplus" as to which individuals could acquire rights and priorities under state law. *United States v. Conrad Inv. Co.*, 156 F 123 @ 127; *United States v. McIntire*, 101 F 2d 650; *Federal Power Commissioners v. Oregon*, 349 U S 435. This court may reduce the amount of water allocated to the defendants, if that course is justified by the law and the facts. It may not, I believe, determine who among them will receive what quantity of water.

The recommendation, therefore, is that the court uphold the 1908 Agreement as a valid and effective conveyance of water rights to the north side signatories, which rights became appurtenant to specific lands under state law. Further it is considered that this case aims at a percentage division between the north and south side, without directing either plaintiff or defendants as to how that water shall be divided.

We must next examine what procedure is necessary to arrive at the final percentages in view of the 1908 Agreement, and here we begin with the directions of the Court of Appeals as to the manner of retrial of this case.

Referring to the 1908 Agreement, the court said, on page 340 of the opinion:

> "It seems plain that if this, as other agreements relating to Indian rights, is to be construed most strongly in favor of the Indians, it must be under-

stood that the right to the use of the 75 percent of the waters must have been limited to the needs as of 1908 of the particular individuals who were parties to the agreement." . . .

"But whether the beneficiaries of the 1908 agreement were dealing as riparian proprietors, or were confined to such owners, or whether owners of appropriative rights were included, their interests as of 1908 were necessarily limited to their then needs, and subsequent uses or ownerships could not enlarge their rights under the arrangement for the division of these waters.

We hold that any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater. This follows from the proposition that it is a fundamental maxim of the law of waters that an individual's rights, no matter how measured or described, can never exceed his needs. Vineyard Land & Stock Co. v. Twin Falls, etc. Co., 9 cir., 245 F. 9, 22. It follows also from the general principle that an agreement of the character of that executed in 1908, must be construed as reserving to the Indians, who previously owned substantially all of the waters, everything not clearly shown to have been granted." . . .

3. Defendants object to construing of the 1908 Agreement most strongly in favor of the Indians. They assert that this rule of construction has been applied in case of treaties or agreements between the United States on one hand, and Indian Tribes on the other because of the great disparity of bargaining power in such a situation. *State v. Tulee*, 7 W 2d 125, 109 P 2d 280.

In certain cases of contracts by governmental agencies on behalf of Indian tribes there has been no construction in favor of the Indians. *United States v. Harris,* 100 F 2d 268; *United States v. Algonia Lumber Co.,* 305 U S 415; *83 L Ed 260.* In these cases, lumber contracts on behalf of Indian tribes seem to have been given the ordinary construction of contracts, but without discussion of this doctrine. See also *42 C J S Indians, #18 Contracts.*

Although favorably disposed toward the position of defendants in this respect as a general proposition, I feel that the Court of Appeals has clearly indicated its view that the 1908 Agreement is to be construed most strongly in favor of the Indians, and that, therefore, among other results, the rights of the north side signatories were limited to their needs as of 1908. This construction, favorable to the Indians, will be followed throughout this report.

4. The language of the court, above quoted, implies a reservation to the Indians, by construction of the 1908 Agreement. Again we find differing views among the parties as to what the court meant, so again a discussion of the issue is indicated.

Defendants point out that there is nothing in the 1908 Agreement which provides for a reverter or forfeiture of the water rights conveyed. The Court of

Appeals, however, has specifically found that there is an implied reservation to the Indians of everything not clearly shown to have been granted. Based on this implied reservation, it has held that " . . . at any time when the needs of those parties to that Agreement, as measured, in 1908 were such as to require less than the full 75 per cent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like manner, greater."

I do not agree with defendant's theory, advanced on page 36 of their Opening Brief on Trial on the Merits, that this refers only to a temporary reverter to the Indians on occasions when the north side lands do not need and cannot use a full 75 per cent of the stream. To me, this sentence means a permanent increase in the Indian's water rights. It is true, and follows from the nature of the 1908 Agreement that on any occasions when the north side lands do not need and cannot beneficially use a full 75 per cent of the waters of Ahtanum Creek (e. g. the early run off, or a sudden freshet during the low water period) the excess belongs to the Indians, even though beyond the 25 per cent limitation of the 1908 Agreement.

This sentence, I take it, means more. It means that if, through change of use of land, abandonment of farming operations, etc. the north side lands originally entitled to Ahtanum water no longer require a full 75 per

cent of the waters of the stream then the right to the unneeded portion permanently reverts to the Indians, and no subsequently renewed demand on the north side would re-establish those rights.

We are dealing, however, in this question, as in others, with gross percentages. Plaintiff's interpretation seems likewise unacceptable. Plaintiff's view is that this question of reversion is to be considered on the basis of the United States on one side, against each individual north side tract on the other — so that if it developed that a particular tract on the north side, entitled to and needing water in 1908, no longer needed it, that water would go to the plaintiff, for use on the south side.

The conveyance, however, was to the north side signatories as a group, and then, among themselves and by state law, they acquired individual rights to that water in a system of priorities. If, in a given year, nature provided an unusually large supply, there was simply more for the qualified water users to share. Similarly, if the owner of a particular water right abandoned it, that simply reduced the number of claimants on the total supply or percentage of water which had been conveyed by the plaintiff. It is only if the qualified north side landowner, as a group need less than the 75 per cent of Ahtanum waters conveyed to them or their predecessors, that the reversion of the unneeded water to plaintiff takes place.

The langauge of the Court of Appeals, tying this reversion to a requirement for less than the full 75 per cent of the waters of the stream, confirms this view, and refutes plaintiff's theory.

## DETERMINATION OF DIVISION OF WATERS

How, under the 1908 Agreement, and the opinion of the Court of Appeals, do we resolve this controversy and divide the waters of Ahtanum Creek? The procedure which seems logical will be outlined and then specific application made in the proposed findings of fact, conclusions of law, and decree.

1. Our first consideration, in determining the proper present division of Ahtanum water between the parties, is the need for that water in 1908 by the north side landowners who were parties to the 1908 Agreement. What need has been proven? Did they actually need 75 per cent of Ahtanum water at that time? This, of course, involves a tract by tract, analysis of the proof presented by the parties, and a determination of what is meant by "need" – another subject of considerable controversy between the parties.

2. Having determined need, and having determined the lands which were owned by signers of the 1908 Agreement, the lands which could use Ahtanum water, and needed it, inquiry must be made as to deraignment of titles to that land to the present defen-

dants. Insofar as the division of water north and south is concerned, only those rights are counted which are deraigned from the parties to the 1908 Agreement. If the Achepol decree has awarded priorities which have no connection with the 1908 Agreement, those rights may be valid under state law, as among the north side landowners. We are not concerned with them here, however, nor will they contribute in any way to the percentage to be allocated the north side.

3. Supplementing the process of deraigning titles, will be an examination into change of use of the lands originally included within the 1908 Agreement. We are directed by the Court of Appeals that users or ownerships subsequent to 1908 will not enlarge rights of defendants under the arrangement for the division of waters. On the other hand, where lands originally needing Ahtanum water, later needed less water, or none at all, because of change of use, that reduced demand must be reflected in an over-all reduced need for Ahtanum water on the north side.

Other issues, such as alternative sources of water, and waste of Ahtanum water must be given very careful consideration, but the three considerations just mentioned seem the basic ones, and I shall discuss them more completely before proceeding to other issues.

1. Need for Ahtanum Water in 1908.

It is plaintiff's view (Plaintiff's Opening Brief, page 3) that defendants have failed to prove what the needs for water were in 1908. Defendants contend (Defendants Opening Brief, page 10) they have established it by proof of certificates of water rights issued in accordance with the Decree in the Achepol case, and further by the oral testimony of a number of "old timers," as to the irrigated status of land in 1908.

The water rights certificate (Defendants Exhibits 30 and 31) issued to north side landowners, and based upon the Achepol Decree of May 7, 1925, appear unacceptable as proof of need for water in 1908. For one thing, if the Achepol Decree itself does not bind the United States in this controversy (and that seems established) an allocation of water based upon that decree would, by the same reasoning, not bind the United States. Also, the certificates themselves do not award one inch per acre, but set that as the maximum allowance. The following excerpt from one of the certificates listed in Exhibit 31 is typical:

> "That the amount of water to which said right is entitled is limited to the quantity which is reasonably and actually necessary for the purpose aforesaid and shall not exceed 2.6 second feet for the irrigation of 130 acres of the lands hereinafter described . . . "

The above maximum limit would, of course, constitute one inch per acre. The Report of the Referee in

the Achepol case (Defendants Exhibit 14, page 11) indicates that because water in the Ahtanum Valley is not obtainable during the last half of the irrigation season " . . . an amount has been alloted to the lands that will enable the water users to apply sufficient quantities that will cause ground storage and partially carry the moisture through the period where the creek has reached a low stage." This is obviously not intended as a season long allocation.

It is also important that the decree in the case of Benton v. Johncox, entered April 11, 1896 (see Defendants Exhibit 118) which decree was in effect at the time of the 1908 Agreement, provieds as follows, on page 14:

> "It is further considered, adjudged and decreed, that whenever under this Decree, persons are entitled to take water by appropriation, that they are entitled to one-half of a miner's inch to each acre."

Benton v. Johncox, was not, as defendants emphasize, a general adjudication of all Ahtanum water rights. It was, however, the one ruling of a court which had considered the need for, and use of water north of Ahtanum Creek prior to the 1908 Agreement. It is certainly not to be ignored, especially in view of the difficulties in determining what the facts were in 1908. If another court, 17 years after the 1908 Agreement felt a higher award proper, that does not prove that the need

had become greater by 1908. We must remember the admonition of the Court of Appeals, that uses or ownerships subsequent to 1908, could not enlarge the rights of the north side landowners, their interests as of 1908 being limited to their then needs.

Plaintiff's view, that the needs of the north side parties to the 1908 Agreement, mean the quantity of water actually being applied by them at that time to a beneficial use, is not persuasive. Need and use are not the same things. It would be possible for water users to *need* far more water than they *used* in a particular period. If the 1908 *use* determined the north sides 1908 *need*, the quantity of snow which fell in the mountains the preceding winter would determine the farmer's need for water; and if a drought had occured that year, it would mean the north side farmers needed little water (since, having little available, they would have used little). The amount of water actually put to a beneficial use in the face of abundant water supplies, could well be an accurate indication of need. Since the Ahtanum Valley does not have abundant water supplies, the suggested test is not valid.

On the other hand, need can not be related to any ideal water supply, or crops, but to the acutual need for water in respect to the crops grown in 1908 — even though the selection of crops was influenced by limitations in water supply. If all the north side lands had

grown hops in 1908, a tremendous need for late water could be shown. Possibly, with unlimited late water, that would have been the situation in 1908, but it did not occur, and the need for water must be related to conditions as they existed.

The 1908 Agreement, of course, related principally to the "natural flow" of Ahtanum Creek. It does not appear, however, that defendants are under the burden of proving that each drop of water used or needed on their lands is "natural flow" in origin, in order to have it credited to them under the 1908 Agreement. That Agreement, after providing in Article 3 for the measurement of Ahtanum water, reads as follows:

> "The total amount of water thus ascertained shall be deemed the natural flow of Ahtanum Creek and the party of the first part shall receive twenty five per cent (25%) thereof as the amount of said waters to which it is entitled by virtue of this agreement, for use on its lands south of said stream; provided, however, that it appears at any time that there is an appreciable seepage or return flow to the main channel of said stream below said point of measurement, then such seepage or return flow shall be divided between the parties hereto in the same proportion as herein provided for the division of the natural flow of said stream."

No provision comparable to this, and relating to the north side, appears in the Agreement. It seems clear that the south side is guaranteed 25% of the measured water (whether the stream gains or loses between point

of measurement and diversion) and the north side takes the rest, it all being considered natural flow in the absence of proof of an appreciable seepage or return flow in the main stem of Ahtanum below the point of diversion.

Defendants introduced evidence from a number of so-called "old timers" as to the acres irrigated on various tracts in 1908, and as to the type of crops and need for water. This testimony begins in Volume 21, of the Record of Proceedings in the Trial on the Merits, at page 4816. Plaintiff argues that this testimony does not establish acreages irrigated, source of water, need for water (particularly in the latter part of the irrigation season) or crop patterns. This testimony is judged on an individual basis in the preparation of the findings of fact, but some comment seems proper at this point. Much of the old timers' testimony, of course, is general in character — they painted with broad strokes. It must be remembered that this testimony was given largely in 1958, fifty years after the year of the 1908 Agreement. If the trial on the merits had occurred ten years later in this long sustained controversy, few, if any, of the old timers would have been around to testify at all. The testimony they did give (and it must be remembered that this is only a general comment) seems clearly admissible, and entitled to consideration and weight. In the absence of contradictory records or other substantial positive testi-

mony as to 1908 conditions, it appears sufficient weight to prevail.

To determine total or aggregate needs for water, of course, we must ascertain, first, how much land was irrigated by natural flow Ahtanum water in 1908 and second, how much water per acre was needed, in terms of acre feet, and in terms of continuous flow.

As to the first point the testimony of the old timers seems the most reliable in the record. Even though they are, of necessity, testifying long after the events, they speak from their own observation of conditions which were close and important to them. This estimate seems more reliable than the estimate contained in the report of October 1, 1907 of Joseph Jacobs, District Engineer for the U. S. Reclamation Service, which was based on a reported survey of 1907 (Plaintiff's Exhibit 79-160, page 170). Also the Code Report of October 11, 1907 (Plaintiff's Exhibit 79-6) contains an estimate of 5500 acres irrigated north of Ahtanum Creek, but emphasizes that the figure is only an approximation, based partly at least upon conversation with landowners. All in all, the testimony of the old timers seems more entitled to credence.

From the irrigated acreage in 1908 as so determined, the next step is to ascertain the aggregate need for water of the north side parties to the 1908 Agree-

ment. The old timers could not offer specific, measured figures. They could, however, tell of the crops they grew, and the principal crops were shown to be grain, grass hay, grass pasture, and hops.

From this testimony, defendants assumed a crop pattern for 1908 of 30% grain, 30% grass hay, 30% grass pasture, and 10% hops, as being based upon evidence in the record. This assumed pattern was presented to Max R. Jensen, an expert witness for defendants, as a basis for a determination of diversion requirements in 1908, to raise these crops, in the stated proportions, on the irrigated acreage. Mr. Jensen's calculation of consumptive use for various crops, and his estimate of diversion duty by adding "allowable" field loss and canal loss, was ridiculed by plaintiff throughout much of the trial on the merits. It seemed very reasonable and impressive to me. The principal difficulty comes with regard to the assumed cropping pattern. These were the main crops grown in 1908, all right, but was this the percentage pattern? The crops might well have been divided this way, but were they in fact? I have found no such estimate by any of the old timers, nor have defendants referred to any. If this pattern were established by competent evidence, I would be prepared to accept defendants calculations of needs as made by Mr. Jensen in Defendants Exhibit 187. The would result in a finding of a diversion requirement in continuous flow in miner's

inches per acre as follows: May, .670; June, .855; July, .990; August, .620; September, .355, and October, .065, for a total diversion duty per acre of 4.4 acre feet.

Probably such a finding would have sufficient basis in the record, but my own view is that the precise pattern has not been established, even if a rough approximation might have been.

What other proof, if any is in the record as to needs for water in 1908? We know, for one thing, that at that time most of the north side landowners were operating under the decree in Benton v. Johncox, which entitled the appropriators to one-half miner's inch per acre. Plaintiff is not, of course, bound by this decree, any more than by the Achepol Decree. However, it is true that these appropriators could not legally use more than one-half miner's inch per acre.

There is other contemporary evidence. The Jacob's report of October 1, 1907 (Plaintiff's Exhibit 79-160, page 171) concludes a flow of 25 cubic feet per second in the Ahtanum, would not, under the methods in vogue, properly irrigate more than 2500 acres. Thus a flow of one cubic foot per second per 100 acres, or one-half miner's inch per acre, was required for proper irrigation. The Code Report of 1907 (Plaintiff's Exhibit 79-6) to the effect that a flow of 20 cubic feet per second would not be sufficient to irrigate over one-third of the lands farmed, works out to a figure slightly below one-

half miner's inch per acre for all land, north and south of Ahtanum Creek, in view of the acreage estimates or approximations contained in the same report.

Tying this figure in with the rough crop pattern disclosed by the old timers testimony, and remembering that the Jensen figures in Exhibit 87, based on the assumed crop pattern, are well in excess of one-half miner's inch per acre, it seems that this is a conservative finding of the needs per acre of the north side landowners in 1908. This conclusion refers to *need*, of course; it is not believed there was enough water in the creek to supply this much water per acre in the low water period of 1908. If the supply had been there, however, this much water could have been used, and would have been needed. This would constitute a diversion duty of approximately 3.7 acre feet for the period from May through October of each, well below plaintiff's estimates of its own needs.

Plaintiff asserts that little late water (after July 1) was needed or used in the type of farming done north of Ahtanum Creek in 1908. However, the 20 c. f. s. measurement of the Code Report (supra) occurred on August 28, 1906, and the conclusion that it was not sufficient to irrigate over one-third of the lands farmed obviously referred to that same time. Also, in the report in Plaintiff's Exhibit 76-160 (page 171) we find the following:

> "The situation on the Ahtanum at the present time is that while the Creek affords sufficient water for all requirements during the early months of the irrigation season, the supply after July 15 is wholly insufficient for the area now under irrigation."

Reference should also be made to the calculations of consumptive use by defendants expert Max Jensen, showing that the crops raised in 1908 *did* need late water.

The plaintiff, properly concerned for the wants of those it represents, who have such a definite need for the limited waters of Ahtanum Creek, may find it easy to believe that the north side landowners do not, and have not needed that water. The whole record indicates the contrary.

For another example, Plaintiff asserts that there was no late flow into Hatton and Bachelor Creeks. We find evidence of hops, requiring late water in lands bordering those creeks on Defendants Exhibit 87. The very participation of landowners off Hatton and Bachelor Creek in the Johncox and Achepol cases and in the 1908 Agreement, clearly evidences a need and a desire for late water, not just the abundant flood waters of May and June.

2. Subsequent Usage in General.

As we consider later usage and irrigation practices, down to the present day, we may give recognition to

the presumption urged by defendants that a condition once proved to exist, is presumed to continue in existence. *Trompeter v. United Insurance Co.*, 51 W 2d 133, 316 P 2d 455. We must remember also the admonition of the Court of Appeals that subsequent uses or ownerships on the north side will not enlarge the rights for the use of water. Thus, whatever increased demands have developed for Ahtanum water through new crops and methods will not increase the recommended award of one-half miner's inch per acre needed in 1908.

We must apply in this regard also, the court's holding, previously referred to, that at any time when the needs of the parties, as measured in 1908, were such as to require less than the full 75 per cent of the waters of the stream, their rights to the use of the waters were correspondingly reduced, and those of the Indians, in like measure, greater. The opinion has already been expressed that we are dealing in gross percentages—that a cessation of need for water in a given north side tract does not automatically award that water to the south side, unless thereby the gross needs of the north side lands related to the 1908 Agreement, are reduced below 75 per cent.

For similar reasons, it is felt that the default of a particular defendant does not automatically award to the plaintiff whatever water was needed on that land in 1908. The land included in the defaulting answer can-

not, it is true, be considered in determining the gross needs and uses of the north side, but that is the limit of the effect of the default.

3. Deraignment of Title.

It is, of course, necessary that the present defendants must deraign their title, must " . . . show and disclose their rights and titles . . . " as directed by the Court of Appeals. The extremely complex task of tracing titles from 1908 to the present was simplified considerably by a stipulation of the parties respecting proof of ownership of land title. This stipulation, set forth in page 10 of the Order of Pre Trial on the Merits, reads as follows:

> "Inasmuch as plaintiff is not at this time in a position to agree as to the various ownerships of the tracts of land involved herein and in order to avoid the necessity of voluminous testimony and proof of ownership of individual tracts, it is agreed that defendants may introduce proof of land ownership sufficient to make a prima facie case, which proof may or may not be challenged by the plaintiff. In the event any ownership is challenged, it is agreed the defendants, following the conclusion of the hearing on the merits, may at a subsequent hearing to be fixed by the court, offer additional proof as to any tract, ownership of which is challenged by the plaintiff and likewise plaintiff at such hearing may offer evidence in rebuttal. The plaintiff shall not later than the conclusion of the hearing on the merits generally file in writing a statement of any ownerships challenged."

Defendants offered proof regarding titles, (see De-

fendants Exhibits 134, 134A, 134B) and none were challenged by plaintiff.

In certain cases, title was deraigned from a 1908 signer who did not own the land at that time, but was a contract purchaser from the state of Washington, acquiring title at a later date upon completion of the contract. It is not felt this situation creates any special problem. The contract purchasers had an interest in the land, although not full legal title. They contracted with reference to the gross water percentages, and thereafter, under state law, part of the gross water rights became appurtenant to their lands. *Pioneer Sand & Gravel Co. v. Seattle C. & D. D. Co.*, 102 W 608.

Several other questions occur when we begin to study current use of north side lands, and need for Ahtanum water. These questions will be stated in order.

4. Temporary Cessation of Use.

Does a temporary cessation of irrigation (e. g. while owner works out for a year or two) forfeit the right to that water, under the 1908 Agreement? I think not. Illness, old age of an occupant, or other factors could cause a failure to irrigate for one or more years, but without any intention to abandon the rights. Without that abandonment, if the land still needs Ahtanum water, it should be counted in determining gross needs.

5. Priority System.

The north side, under the Achepol Decree, has a system of priorities, ranging from Number 1 to 24. In time of low water, the higher numbered or poorer rights are successively eliminated, leaving the lower numbered or better rights to use the Ahtanum water that is left. Plaintiff contends that the lands which customarily do not receive water during the low water season, because of their poorer rights, should not be counted as needing Ahtanum water. It seems plaintiff has thereby exposed itself, to some extent, to defendants charge that it wishes to make use of the Achepol Decree when its position is thereby supported, but does not otherwise wish to be bound by it.

Our judgment as to current needs for Ahtanum water, by the north side lands, should not be related in any way to the system of priorities under the Achepol decree. An acre of land with a #18 right can need just as much water as an adjoining acre with a #3 right, even though, because of short supply, the water may not often be available during the latter part of the irrigation season. The experience in early July of 1958 illustrates this. A sudden heavy rainstorm in the drainage area caused Ahtanum Creek to rise rapidly. Land which needed water, but had not been receiving any, was readily available, and the temporarily increased flow was put to a beneficial use.

The records show that plaintiff has customarily taken

more than the twenty-five per cent allocated to it by the 1908 Agreement. This extra water, if released to the north side, would have found acres ready to receive it – acres which needed it, and could put it to a beneficial use, but which were not receiving any because of the low supply.

It was stipulated by the parties in the Order in Pre-Trial on the Merits, page 4, that "All the lands in Ahtanum Valley are arid in character. Those lands must be irrigated with large quantities of water to make them productive. The yield of Ahtanum Creek is insufficient to adequately irrigate the lands either on the north or south side of that stream." This tends to confirm the other indications of continuing need.

6. Return Flow.

Plaintiff maintains that after July 1 of each year, no base flow or natural flow Ahtanum water reaches east of the so-called "Fiedler Line" between Ranges 17 and 18, E. W. M. The conclusion is drawn that this area, subsisting entirely on return flow, cannot be counted as needing Ahtanum water. Mr. Fiedler testified, however, (Tr. 10, 695 et seq.) that this *might* be the situation after July 15, 1957, but expressed the opinion that base flow reached the entire length of the creek in other years. It must be remembered too, that plaintiff's action in taking more water than the 25 per cent allocated it

by the 1908 Agreement, cuts down the amount of base flow available for Hatton and Bachelor Creeks – but that cannot affect the *need* for it. Finally, there have been no precise measurements in any of these streams by which the relative amounts of base and return flow could be determined, although it seems conceded that return flow is heavy in the lower part of the valley.

In view of these factors, and the fact that most defaulting defendants (whose land is not counted in any event as needing Ahtanum Water) are located east of the Fiedler line, it seems improper to establish that line as an eastern boundry to the area which may be considered as needing Ahtanum water. Other factors will, of course, affect the decision in each case, but location east of the Fiedler line should not be decisive.

Plaintiff's claim to return flow is, under the clear terms of the 1908 Agreement, restricted to 25 per cent of any appreciable seepage or return flow to the main stem of Ahtanum Creek, below the point of measurement. Any return flow in Hatton or Bachelor Creeks, is obviously the property of defendants, free of any claim by plaintiff. Plaintiff's belief that return flow in the lower reaches of Hatton and Bachelor Creeks affect the amount of natural flow which should be awarded plaintiff in the upper reaches of Ahtanum Creek, is, I believe, unfounded.

7. Transfer of Use.

There have been instances where water has, through the years since 1908, been applied on different acreage of the same tracts, or even transferred for use on different lands. This should not logically affect defendants' rights to the use of water. It would be a harsh rule that would restrict the north siders to applying water to the exact specific acres to which it was applied in 1908. Even though defendants' rights to water are limited to the needs as of 1908 of the particular individuals who were parties to the Agreement, and even though subsequent uses cannot enlarge those rights, there seems no reason why that needed water cannot, with current credit, be applied on other land, so long as title is traced to the 1908 signatories, and as long as there is no enlargement of total demand.

## WASTE

The issue of waste has been a major one in this case. The original complaint, filed July 2, 1947 contained no reference to waste of water.

In determining the first appeal in this case, the Court of Appeals directed its attention to charges of waste by plaintiff against defendants, and made the following comment:

> " . . . Waste of irrigation water is not to be tolerated and in arriving at a determination of the rights and

needs of the defendants, the court must take into consideration the question of wasteful practices alleged to have been carried on by the defendants. In a case of this character an injunction against such waste is an appropriate part of the decree if the facts developed disclose a need for it. Campbell v. Grimes, 62 Kan. 503, 64 P. 62. If waste cannot otherwise be prevented, a court may restrain a party from using any water until his waste is averted. Glaze v. Frost, 44 Ore. 29, 74 P. 336."

On the re-trial of this case, the charges of waste were expanded considerably. See Contentions No. XXII of the United States of America, Order of Pre-Trial on the Merits, Page 17; Contention No. IV of Defendants, Order on Pre-Trial on the Merits, Page 29.

The principal contentions of plaintiff against defendants in regard to waste may be stated as follows:

1. Use of old, meandering natural channels for the conveyance of water.

2. Presence of water consuming phreatophytes along the streams and ditches.

3. Absence of headgates and measuring devices.

4. Application of water to poor soil or wet areas.

A preliminary explanation should be made regarding Plaintiff's Exhibit 11, upon which Plaintiff's expert witness, Robert McDole placed large green "waste" stamps. In some cases these stamps indicated an observation or conclusion that water was actually being wasted. For the most part, however, they represented

testimony that somewhere in a given 40 acre tract, a condition existed (such as salt grass, or low, wet areas) which were such that it would be wasteful to apply water to that land (Tr 3161, 3166-6167). In some places the stamp represents testimony that it would be wasteful to apply as much as 3½ or 4 acre feet of water to a given area (Tr 3162). For these reasons, the green "waste" stamps, which make an impressive showing on the exhibit, should not be accepted as evidencing testimony that waste exists, without a specific check of the transcript.

It should be emphasized further that, under the authority of the court of appeal's opinion in this case, a finding of waste on a particular tract of land would not cause a reversion to plaintiff of the water used or wasted on that tract. The only direction of the Court of Appeals is that an injunction against waste is appropriate, even to the extent of restraining a party from using any water until his waste is averted. Certain of plaintiff's claims of waste are, however, so broad in scope that an injunction based upon their full acceptance would come close to inhibiting the delivery of Ahtanum water to the north side, leaving it for the use of those whom plaintiff represents.

It is my conclusion that no waste of water has been shown on either side of Ahtanum Creek, sufficient to justify an injunction. The allegations of waste are of

two principal classes, and will be considered separately. The first concerns human acts or omissions (e. g. failure to install headgates and measuring devices; failure to keep them in proper repair; permitting water to run uncontrolled). The second concerns natural conditions in the Valley (e. g. the allegedly porous condition of the natural stream channels used as conduits; soil conditions).

1. Human Acts or Omissions as Waste.

There is no question that the defendants north of Ahtanum Creek wasted considerable water in the past, through the failure to have effective control and measuring devices. The Pendente Lite Order, filed June 10, 1957, directed that no water traceable to Ahtanum Creek be diverted in the absence of effective control and measuring devices. (An exception was made as to headgates at the intakes of Hatton and Bachelor Creeks, since it was felt they would serve no useful purpose.)

These devices were installed. Since then, and during the trial on the merits, there have been complaints as to devices leaking, not measuring water, water permitted to run onto roads, etc. For the most part, these have been temporary conditions, corrected when attention was called to them. The occasional occurrence of such a condition would appear to be unavoidable,

and the best we can ask is that the parties be vigilant to spot and correct such conditions.

(Plaintiff has raised, in relation to the enforcement of the Pendente Lite Order, the question of conditions at Hatton, Bachelor and Johncox intakes. These will be discussed in a separate report relating to the pendente lite order, to be submitted with this report.)

No overall pattern of willful or negligent waste of water by human action appears; nor does any consistent pattern of willful or negligent waste of water by any individual.

2. Waste of Water Through Natural Conditions.

a. The use of meandering natural streams should not be enjoined. This is a common irrigation practice, and is specifically authorized by the Revised Code of Washington 90.28.050. Moreover, the presence of such channels is a practical necessity in the Ahtanum Valley, where there is no provision for storage of waters, and spring is a time of high water run off and occasional flooding. The physical characteristics of Ahtanum Valley are such that the north side of Ahtanum Creek occupied by defendants, takes almost the entire brunt of this high water run off and flooding; and the presence of natural stream channels, such as Bachelor and Hatton Creeks, is desirable to carry off such high water.

b. Phreatophytes. There was no showing of waste

of irrigation water through the presence of phreatophytes, which exist in similar quantities on both sides of Ahtanum Creek. Moreover, positive good comes from the shade for stock provided on both sides of the creek, and the action in binding creek banks during flooding, of particular value on the north side.

c. Application of water to wet, or alkaline areas. Where an area is wet during the low water season, no water should be applied to that, nor should that area be counted as needing water. If, however, an area is wet during the period of high water run off, but dried out by the period of low flow, it would seem proper to apply irrigation water.

As to alkalinity, it would appear that the decisive question is whether the land can be productive, and can be farmed profitably. If not, it would be waste to use Ahtanum water thereon. If so, it would appear that Ahtanum water could very properly be applied to it, and that such application would not constitute waste. We cannot, of course, restrict the application of water to only the finest and most productive of lands.

d. Claimed excessive loss of water in transportation and application, because of the nature of the soil. This seemed to become, as the case progressed, Plaintiff's principal contention as to waste. It is claimed that there are excessive losses in the natural streams

which defendants use to transport their water, and excessive field losses in certain land areas. Plaintiff has designated a specific area in the valley as the "Sieve Area", with testimony that water passing through that area is lost at an unconscionable rate.

1. Stream Losses:

Plaintiff contends there are excessive losses involved in the transportation of water in the natural streams because these streams are porous and gravel bottomed. It would have been possible to provide specific stream measurements at various points in each of the principal natural streams, and these, together with the records of diversions off those streams, would have given us an accurate picture of stream losses or gains. Nothing of this nature was attempted. The presence of gravel on a stream bed is, not in itself, of course, proof of excessive stream losses.

Plaintiff has pinpointed one question of stream losses by a Motion for Production of Records or Finding of Waste by Defendants, filed October 16, 1959. This motion, which relates to allegedly excessive losses in the main stem of Ahtanum Creek between the main B. I. A. diversion, and the intakes of Hatton and Bachelor Creeks, was denied by order entered December 4, 1959, and objections to that motion are now pending before the court. The denial was based partly upon a hold-

ing that the issue of waste of water in the creek bed of the main stem of Ahtanum Creek below the main B. I. A. diversion should be considered and covered in this final report based upon the record made in the trial on the merits.

The theory of plaintiff's contention is that there is no substantial loss between the gauging stations, on the north and south forks of Ahtanum Creek and the main B. I. A. diversions, and that return flow above the main B. I. A. diversion is equal during most of the irrigation season, to diversions from the stream above that point. Thus plaintiff subtracts its own B. I. A. diversion from the total water measured upstream at the gauging stations, and asserts that the difference was "released to defendants" past the main B. I. A. diversion. This theory is supported by assertions and estimates, but not by actual measurements. It would appear possible to have actually measured the water released past the main B. I. A. diversion, and then we would know how much water was lost between that point and the Hatton and Bachelor diversions (assuming, of course, that there was also measurement of the water in the main stem passing the Hatton Creek diversions). In the absence of such measurements, we can only speculate on what the losses were, and where they took place.

It should be remembered, too, as the Court of Appeals emphasized in its opinion, that plaintiff owns to the

middle of Ahtanum Creek, and the south fork of Ahtanum Creek, where they constitute the northern boundary of the Yakima Indian Reservation. Plaintiff uses the entire stretch of these creeks, from the south fork gauging station, down to the lower B. I. A. diversion, as a conduit for the conveyance of the water which it uses. Small individual diversions branch off the south fork. Both the main and the lower B. I. A. diversions branch off the main stem. Plaintiff cannot be heard to complain of losses in these creeks, as though they were the sole responsibility of defendants. Nor, since plaintiff itself uses *these* channels, and bases its irrigation system on them, should it complain of defendants use of other natural channels which geography does not permit plaintiff to use.

As defendants point out in their opening brief (pages 43-51) this is an older irrigation system, compounded of the rights of early appropriators and riparian owners. Adherence to the highest standard of efficiency is not required; nor improvements (such as impervious ditches) beyond the financial capacities of the parties.

The following cases are of particular interest in the regard:

*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* (Calif.) 45 P 2d 975; *Roeder v. Stein,* 23 Nev. 92, 42 P 867.

It is true that courts have held, for example, that a state is entitled to an injunction against excessive diversion of water from an artesian well, by permitting it to run uncontrolled for twenty-four hours a day over grazing lands without an irrigation system, resulting in the waste of many times as much water as is put to a beneficial use (*State v. McLean*, (N. M.) 308 P 2d 983). Such a holding bears no relation to any present condition in the Ahtanum Valley.

Similarly, *Strafford v. White Bluffs Land and Irrigation Co.*, 63 W 10, 114 P 833, cited by plaintiff as contrary to the proposition above, holds only that a regulation of a water company, providing for an intermittant rather than a constant flow, cannot be held as a matter of law to be unreasonable or unjust.

We should remember also, that in the lower reaches of the Ahtanum Creek system there is much use of return flow, and the overall picture may well be considered that of a gaining, rather than a losing stream.

2. Field Losses:

Plate 3 of Plaintiff's Opening Brief, page 12, outlines certain lands in area denominated by plaintiff as the sieve area, with an assertion that field losses run from 65 to 70%. This is based upon testimony by Mr. Warren Starr, an expert witness for defendants, that field losses would run that high in about 180 acres in

that area. This is probably the most dramatic of plaintiff's claims regarding waste through application of water to non-appropriate soil, but even in this case, it does not appear that application should be enjoined.

The soils concerned are classified for the most part as medium soils, with moderate permeability, with soil thickness of ten to twenty inches above gravel. Therefore, they are not light, nor porous, although thinner than most. Soils of this type are accepted for irrigation in other projects in the state of Washington (Tr. 10, 127). Mr. Starr concluded that it would be economically feasible to irrigate these lands and personal observation on field trips confirmed that there are very productive lands in that specific area.

We should remember also, that for each acre of this land, traceable back to the 1908 Agreement, only ½ miner's inch of water is being allocated, well below the flow necessary to make up the 4.8 acre feet which is a reasonable diversion duty for the land at the present time (but which, of course, goes beyond proven 1908 needs). Economic consideration may promote the development of pipe lines, sprinkler systems, etc. on the north side, to conserve the supply of water. I see no conditions now, demanding that this court force such expenses on individual farmers, or groups of farmers north of the creek.

In any event, if it be considered that losses of water in this manner either in transportation or application, require a transfer to the south side, and I do not so understand the opinion of the Court of Appeals, we have no proof that the same water would be more efficiently used on the reservation. Plaintiff did not keep records of individual diversions off the main or lower B. I. A. canals. It submitted estimates of canal losses, but measured proof as to how much water was lost in transportation and how much water per acre was reaching the farmers' fields, is totally lacking. In such a situation, there is certainly a greater reluctance to find "unconscionable" waste on the other side of the creek.

In general, then, it may be said that, considering the geography and geology of the valley, the type of farming and of soils, the history of the development of irrigation, defendants are now irrigating with reasonable efficiency, and there is no unreasonable or enjoinable waste (either through irrigation methods or soil conditions) of the water which is diverted north of the creek.

## ALTERNATIVE SOURCES OF WATER

Another of plaintiff's strongly urged contentions is that there are alternative sources of water on the north side, which reduce the need for Ahtanum water. These will be considered separately.

1. Tieton Waste.

Waste water from the Tieton Irrigation Project, to the north of the Ahtanum Valley occasionally comes down into the valley, and flows into the north side diversion works, constituting an obvious supplement to the water supply of some of defendants. This flow, however, is so spasmodic and unpredictable, that it cannot be counted on, and consequently we should not consider it as reducing the demand on Ahtanum Creek.

2. Wells.

The only reference to wells in the opinion of the Court of Appeals is contained in the following paragraph, on page 342:

> "Another issue raised by the United States in the pretrial order is that the defendants have such numerous wells by which an additional draft has been made upon the available physical supply of water within the watershed. This is claimed to be to the detriment of the United States."

The Order on Pre-Trial on the Merits contain no reference to wells as an alternative source of water. In the actual trial, however, plaintiff vigorously advanced the proposition that irrigation water was available through wells on the north side, and that defendants should be required to utilize this source, rather than use the waters of Ahtanum Creek. No point was made that the wells constitute an additional draft on the available water supply, as urged previously.

It is true that the water table is high in parts of the Ahtanum Valley; it is also true that there are many domestic wells, and a few irrigation wells on the north side. There is no proof, however, that any substantial sustained flow can be produced by irrigation wells. The indication, in fact, is to the contrary — that a second irrigation well in a given area materially reduces the flow of the first well. Also, there is testimony that in many areas, the nature of the sub-soil is such that drainage into a well is slow and continued use causes a rapid drawdown of the well.

Existing wells appear to be used only as a supplement during low water season, because of the cost of pumping. No justification exists for compelling defendants to incur the expense of constructing and operating wells, where the supply of water would be uncertain and expensive, and where any reduction in Ahtanum water applied upstream could well adversely affect the water supply in these wells.

3. Springs.

Springs exist in various areas north of Ahtanum Creek, and plaintiff advances these as alternative sources of water for the defendants. The springs, however, seem to be largely dependent upon irrigation application of Ahtanum water, so that they fall, or even disappear, during the low water period, when the need for irrigation

water is critical throughout the valley. It follows that any ordered reduction of Ahtanum water applied to irrigation would further lower the springs whose existence had been used to justify that reduction.

Furthermore — and this applies to all suggested alternative sources of water, not just to springs — it must be remembered that the recommended award per acre is considerably below existing needs, based upon present operating methods. The continuous flow of ½ miner's inch per acre met the needs as of 1908, and adds up to a diversion duty of approximately 3.7 acre feet per acre. The estimate of current diversion requirements were 4.5 acre feet per acre by plaintiff and 4.8 acre feet per acre by defendants, both substantially in excess of the 1908 requirements which form the basis for the current recommendation.

Any other available water then, which may help to make up this deficiency, should be considered supplementary water, not replacement water. This is particularly true where the low water Ahtanum flow is such that many acres of land entitled to that water, and needing it, are entirely cut off from it, and do not even receive water measured by their 1908 needs.

The development of a supplemental source of water should not, in any event, operate to cut off existing water rights of the developer, who may use it as he wishes. *Reno v. Richards,* (Idaho), 178 P 81; *Pomona*

*Land & Water Co. v. San Antonio Water Co.*, (Cal.), 178 P 881.

## PRESCRIPTION

Plaintiff has commonly, and particularly during the period of low flow, taken at the main B. I. A. diversion, more than 25 per cent of the Ahtanum flow measured at the north and south fork gauging stations. For two reasons, however, this should not be the basis for any claim of title to that excess flow by prescription.

The first is that there is no proof of uninterrupted hostile possession for the ten-year period of the statute of limitations before the filing of the complaint herein, on July 1947. Particularly in the early part of the irrigation season, plaintiff's diversion is often considerably below the 25 per cent authorized by the 1908 Agreement. Plaintiff itself has grounded its claim upon no specific reference to any definite ten-year period in which it asserts a continuous hostile possession of water rights in excess of 25 per cent.

The following quotation from *Authors v. Bryant*, (Nev.), 38 P 439, set forth on page 26 of Defendants' Opening Brief, is particularly significant:

> "Theoretically, perhaps, permanent water rights may be acquired by prescription, even as against an appropriator, by uninterrupted, open, and notorious adverse use under a claim of right for a period of 20 years; but, even so, the other party or parties, must have knowledge of the use made of his, or

> their property, and the use must be hostile. This imports, of course, more than the mere use of water from a common source. Some authorities say that it must be such a use as would furnish ground for a suit by the owner, and, if at any time there is sufficient water in the stream for all, during such period, at least, there can be no invasion of the other parties' rights sufficient to start or continue the statute running."

The second reason is that the defendants were always barred from protecting their water rights by legal action against the United States of America. The United States could, of course, have sought adjudication of water rights at any time, either before or after the 1908 Agreement; similarly it could, by legal action, have attacked any excess diversions by the north side. These possibilities have not been open to the defendants.

The Court of Appeals held that the rights of the Class Three defendants were not barred through passage of time, because the United States, a necessary party to any action brought to protect those rights, was not susceptable to suit. The same reasoning would seem to apply with at least equal force to the water rights of the defendants, as against hostile uses by plaintiff United States of America.

## CLASS III DEFENDANTS

Under the clear import of the Court of Appeal's opinion, the following conclusions apply to the "Class III" defendants – the successors in interest of the origin-

al allottees of lands on the Yakima Indian Reservation south of Ahtanum Creek.

1. The Class III defendants have lost no rights to the use of water, and are entitled to participate rateably in the use of Ahtanum water to be awarded the plaintiff as trustee.

2. Beyond making the aggregate award to the plaintiff, this court should attempt no specific directions as to how much water the Class III defendants should receive. As the Court of Appeals said, in another connection, " . . . the United States has the right to make distribution of its water under such rules as it may adopt, as provided by 25 *U S C A 381*, (note 16, supra). It is no concern of ours which particular parcels or allotments are served by the Indian Service ditches, so long as adequate proof was made of their aggregate needs."

## CONCLUSION

In the Order of Pre-Trial on the Merits, the parties agreed as follows: (Paragraph IX, page 4)

> "All of the lands in Ahtanum Valley are arid in character. Those lands must be irrigated with large quantities of water to make them productive. The yield of Ahtanum Creek is insufficient adequately to irrigate the lands either on the north or south side of that stream."

The course of this case, including field trips, only served to confirm and emphasize those facts. Both sides,

north and south, need water desperately. Neither has enough. The United States, by its action in 1908, gave to north side landowners water which the Indians and their successors in interest would ultimately need. This action, though improvident, and an act of confiscation, was effective.

If the south side could have used the water and can now use it, the same is true of the north side parties to the 1908 Agreement, and their present successors in interest. Reasonable proof of 1908 needs was produced, through acreage estimates of "old timers" and proof of the accepted water duty of the time. Indeed, in view of the lapse of time, it is hard to see how stronger proof could have been offered. The only alternative is that the United States, which alone had the initiative in bringing this action, could have won it by the mere passage of time.

Present titles to land and water were deraigned from 1908. Present water needs for those lands were shown (greater than 1908, but that cannot affect the award). It is natural that the proposition was accepted and urged, on behalf of the south-siders who need water, that the north-siders do not need and are not effectively using *their* water. The proof does not bear this out. The need exists on both sides of the creek, and the use of the water is reasonably efficient, considering all conditions.

So it is that an award of 75 per cent of the measured flow of Ahtanum Creek to the defendants is recommended, when that is necessary to provide the irrigated acreages north of Ahtanum Creek, treaable to the 1908 Agreement, with one-half miner's inch of water. The exact measured flow at which that division should begin, is set forth in the proposed findings of fact, conclusions of law and decree, submitted herewith. As to the excess over this basic need, in periods of high flow, defendants rights will be only in subordination to the higher rights of the plaintiff as trustee for the Yakima Indians. This recommended award will not provide enough water for the defendants; what is left will not provide enough water for the Indians and their successors in interest. This is an old and sad story in the Ahtanum Valley. But courts cannot provide more water; they can only divide existing water after full consideration of the applicable facts and law and in accordance with them.

It is believed that the proposed findings of fact, conclusion of law, and decree submitted with this report, accomplish this purpose.

Respectfully submitted,

/s/ Smithmore P. Myers
Smithmore P. Myers
Special Master

# APPENDIX "E"

## EASTERN DISTRICT OF WASHINGTON
## UNITED STATES DISTRICT COURT
## SOUTHERN DIVISION

UNITED STATES OF AMERICA,
*Plaintiff*

v.

AHTANUM IRRIGATION DISTRICT,
a corporation, et al.,
*Defendants.*

No. 312

## MEMORANDUM DECISION OF JULY 6, 1961 AS REVISED JANUARY 26, 1962

The following is a revision of my orally-announced decision of July 6, 1961. Material omissions are noted by asterisks and material revisions or additional matter is underscored.

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This case, filed by plaintiff on July 2, 1947, is now before me fourteen years later for decision upon plaintiff's exceptions to the master's report, proposed findings of fact and conclusions of law and decree. These were submitted after prolonged and extensive hearings on the merits by the special master, Honorable Smithmoore P. Myers, pursuant to an order of reference and appointment entered on June 10, 1957.

The hearings before the master were conducted under the provisions of a pretrial order on the merits filed herein on July 20, 1957, which set forth a preliminary

ary statement as to the status of the case with respect to certain action already taken by the court and master under an earlier appointment. Also included were agreed facts, contentions of the parties and certain stipulations as to procedures to be followed. ***Because the parties were irreconcilable in their views as to the nature of the adjudication required, agreement could not be reached as to the issues of fact and law.*** Attached to the pretrial order were various documents that need not be enumerated but which were admittedly material to the trial on the merits.

Hearings were held intermittently for some one hundred thirty-five days during 1957 and 1958, with argument and briefs filed thereafter. The case was finally submitted to the master in August of 1959. His comprehensive report and proposed findings of fact and conclusions of law and decree were filed on April 15, 1960, together with a supporting record aggregating in excess of fifteen thousand pages of transcript and voluminous exhibits.

The history, background and issues involved in this litigation are fully discussed in the published opinions of the late Judge James Alger Fee, Circuit Judge Walter L. Pope, and the report of the master. United States v. Ahtanum Irrigation District, 124 F. Supp. 818 (D. C. E. D. Wash. 1953) and United States v. Ahtanum

Irrigation District, 236 F. 2d 321 (9 Cir. 1956). I believe it unnecessary to again relate this background.

Under the provisions of the pretrial order the parties were allowed thirty days from the filing of the report within which to file exceptions to the master's report, proposed findings of fact and conclusions of law and decree. No exceptions were filed by defendants but within the time allowed plaintiff filed extensive and in many instances ill-defined exceptions. Without purporting to critically or completely analyze plaintiff's exceptions they may, for purposes of this memorandum decision, be broadly summarized and grouped as follows:

First, those relating basically to issues of law:

Exceptions 1, 3 and 4 challenge the master's conclusion that this court is without jurisdiction to adjudicate the rights, duties and liabilities of the parties except as to the issue of gross percentage division of Ahtanum Creek flow between the north side users and the south side users.

Exception 2 attacks the master's conclusion that In re Ahtanum Creek, 139 Wash. 84 (1926), known as the "Achepohl Decree," is a valid and binding determination of the rights as among the north side water users and is res adjudicata as to them.

Exceptions 5 through 12 and exceptions 36 chal-

lenge the master's conclusions that defendants deraigned their titles from signatories of the 1908 agreement; that defendants are entitled to 75% of the natural flow waters of Ahtanum Creek if that percentage does not exceed 57.2 cubic feet per second; that title be and is quieted in the respective parties to the percentages in the proposed decree; and that the default of a particular defendant does not automatically award to plaintiff whatever was needed on that land in 1908. These challenges, in part, are made on the assumption that the master was in error in not recommending judgment for plaintiff against four hundred fifty-seven defendants.

Exception 37 attacks the master's conclusion that plaintiff has established no right to the diversion of Ahtanum Creek water beyond 25% thereof by reason of laches or prescription.

Exceptions 38 through 41 challenge the master's interpretation of the 1908 agreement, and his conclusion that it is a binding contract and conveyance with 75% of Ahtanum water being conveyed to defendants and 25% being conveyed to plaintiff.

While certain of the above exceptions may involve mixed questions of law and fact they principally present issues of law.

The exceptions relating basically to issues of fact are as follows:

Exceptions 13 through 21 challenge the master's findings setting forth defendants' properties to be considered as determining needs in 1908 and 1957. Further, they challenge the finding of a need of one-half Miner's inches for each of 5,718 acres in 1908 and 5,801 acres in 1957.

Exceptions 22 through 24 attack the master's finding that defendants have established a diversion requirement of 3.7 acre feet in 1908 and 4.8 acre feet in 1957 at the rate of one-half Miner's inches per acre during the irrigation season.

Exceptions 25 through 35, and exceptions 37 attack the master's findings that there is no proof that the use of Batchelor and Hatton Creek waste water; that if any waste occurs in the main stem it occurs on both sides of the creek; that marshy and boggy areas are not related to waste; and that there is no proof of excessive loss in transportation of irrigation water.

After the filing of briefs counsel for the parties were heard by me in oral argument on plaintiff's exceptions for a period of three days in November, 1960. On January 16 and 17, 1961, I took evidence and heard argument on plaintiff's motion to modify the pendente lite order of June 10, 1957, as amended. At the conclusion of that hearing I withheld final ruling on Plaintiff's motion, stating, in substance, that a definitive finding and

conclusion on the motion would involve a determination on waste and should await, if feasible, a final decision by me on plaintiff's exceptions to the master's report, proposed findings of fact and conclusions of law and decree. I have reviewed all the pertinent evidence, including the exhibits cited and relied upon by counsel as well as the decisions and law applicable. While time has not permitted me to prepare a detailed opinion I have reached a decision and believe I should now announce it to avoid further delay of this prolonged litigation. In so doing I reserve the right to amplify the conclusions and views expressed herein. This is not to indicate that I have any intention of changing the ultimate conclusions reached but rather it is to permit a more complete opinion or correction of any inept wording should time *permit* and circumstances justify it.

The numerous exceptions of plaintiff raise a multitude of questions but underlying is the fundamental issue: What is the nature and effect of the 1908 agreement *and its influence on the scope of the adjudication involved?* Since the time this case was remanded by the Court of Appeals counsel for the parties have been at opposite poles on this issue. Plaintiff has insisted that the agreement is no more than a temporary working arrangement, * * * conveyed no water rights to the north side signatories or their successors *and therefore this action is the normal water adjudication requiring*

*a tract by tract determination of water rights.* Defendants, on the other hand, have insisted that the agreement was a settlement of a dispute and constituted a division and conveyance of water rights between plaintiff, as trustee for the Indians on the south side of Ahtanum Creek, and the north side water users as a group, the division and conveyance being in gross. Believing that this issue *should* not be resolved without consideration of evidence I declined to rule on the issue in pretrial conference and the matter went to trial before the master with plaintiff proceeding on its theory and defendants on theirs.

The master in effect adopted defendants' theory on this basic issue and has set forth his ultimate conclusions in the first *four* proposed conclusions of law.

*The report of the master fully sets forth his reasoning in reaching these conclusions, most of which I can accept and follow. However, I question his interpretation of the opinion of the Court of Appeals as to the nature of the 1908 agreement and his construction of the agreement as an instrument of conveyance (proposed conclusion of law No. 1) and the necessity of his conclusion that a tract by tract adjudication of the water rights of the north side users would be beyond the jurisdiction of this court (proposed conclusion of law No. 3).*

*NATURE OF THE AGREEMENT OF 1908*

While I have reached the same * * * result as the master I have done so by a *somewhat* different route. I question the master's conclusion that the 1908 agreement conveyed water rights in Ahtanum Creek to defendants.

From the master's report, pages 3, * * * *4 and 5,* it seems clear that he felt that the issue of whether or not the 1908 agreement was a deed of conveyance was no longer open, i.e., it had become the "law of the case" from the previous Court of Appeals opinion, 236 F. 2d 321 (9 Cir. 1956), that the 1908 agreement conveyed water rights to defendants.

* * *

The "law of the case" doctrine, unlike res adjudicata, only encompasses those questions which were actually raised and decided in the *earlier* proceedings. Messenger v. Anderson, 225 U. S. 436 (1912); Hartford Life Ins. Co. v. Blincoe, 255 U. S. 129 (1921); Electrical Research Products v. Gross, 120 F. 2d 301 (9 Cir. 1941). * * *

*Assuming that the question of whether or not the 1908 agreement was a deed of conveyance could have*

*been raised in the Court of Appeals the issue was not raised or decided.*[1]

*The Court of Appeals, in considering the agreement of 1908, decided primarily that Code, as the duly authorized agent of the Secretary of the Interior,* had authority to execute the agreement. This was the issue raised; this was the issue decided. *In deciding this issue it is apparent that the court considered the validity and effect of such an agreement as indicated by the excerpts cited. (Report, page 4). They did so because it followed implicitly from a decision sustaining such authority that a valid and binding agreement resulted which could serve to take away three-fourths of the Indians' water rights. (Opinion, page 339).*

*However, it remained for the trial court to determine after trial and a full consideration of all the evidence the true nature of the agreement of 1908 and the extent and character of the rights of the parties established thereunder not only in 1908 but also as they have been continued until the present. Such determination,*

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[1] It appears it could have been. See question of law 18 of the original pretrial order signed by Judge Fee August 1, 1951, which provides:

"Whether wholly aside from the other aspects involving the invalidity of the agreement of 1908, that agreement could constitute a valid conveyance of rights to the use of water, compromise litigation involving that water, or a partition of Ahtanum Creek on the basis which it sought to accomplish."

*of course, must be guided by the views expressed by the Court of Appeals.*

Although it could be argued, as an original proposition, that this agreement was a conveyance of an interest in real property, the fact that it lacks essential opperative words of grant prevents me from so *concluding*. Nor can it fairly be said that the 1908 agreement constituted a contract to convey an interest in the water rights of Ahtanum Creek.

*As I examine the transaction in light of the evidence it appears unimportant whether the contract be construed as a technical conveyance. Whether one loses an interest in realty by deed, bequest, adverse possession, or in compromise of a dispute makes little difference so long as he has been effectively deprived of his possession of and dominion over that interest. However, it is necessary to determine here what the contract did accomplish.*

In my opinion, the most reasonable characterization to be placed upon the 1908 agreement is that it was an agreement whereby the parties settled a dispute as to their respective water rights in the creek and as such is similar in legal effect to the well known "boundary line agreement." Bree v. Wheeler, 87 Pac. 255 (Cal. 1906). This conclusion is based upon a consideration of case authority dealing with this issue, the agreement

itself, and the known objectives the parties were attempting to accomplish by entering into this agreement. An agreement of this type, favored in the law as it operates to settle disputes, does not convey title to either party but merely establishes their respective rights. It cannot be unilaterally abrogated and is binding upon the parties and their successors in interest. Young v. Blakeman, 95 Pac. 888 (Cal. 1908); United States v. West Side Irrigating Co., 230 Fed. 284 (D. C. E. D. Wash. 1916), affirmed 246 Fed. 212 (9 Cir. 1917).

Following this approach it seems clear to me that the 1908 agreement *settled disputed rights and accomplished a percentage division in the aggregate of* the water in Ahtanum Creek *which was* binding upon plaintiff and defendants.

• • •

*SCOPE OF ADJUDICATION AND JURISDICTION*

I am in complete agreement with • • • the master • • • so far as he concluded that • • • *an* adjudication as to *the water rights appurtenant* to each tract of land *was not within the issues presented. I do not agree that it is necessary to conclude that such an adjudication* would be beyond the jurisdiction of this court.

Clearly, *this court has jurisdiction under Title 28 U. S. C. §§ 1345 and 2201. See also United States v. Lee, 106 U. S. 196 (1882).* The question, *however,* is not whether this court has jurisdiction to determine the

rights to *the* waters *of Ahtanum* as between plaintiff and each individual defendant, as argued by plaintiff, but rather whether such an individual *tract by tract adjudication* is within the scope of the issues *as presented by the evidence.*

When Plaintiff initiated this litigation in 1947 it was upon the theory that the 1908 agreement was invalid as beyond the authority of the government agents executing it. Plaintiff requested the court to quiet title to the water of Ahtanum Creek in the United States and its Indian Wards as against each individual defendant. Had plaintiff prevailed upon this theory there would have been a complete adjudication between each north side defendant and the government. This would have resulted in limiting defendants' water rights in Ahtanum Creek to that water which the Indians did not need for irrigation of their lands available for cultivation in 1908 or thereafter. Such a conclusion, limiting defendants' rights to surplus water, would be unavoidable under the rule set down in Winters v. United States, 207 U. S. 564 (1908). However, when the Court of Appeals held that the execution of the agreement was not beyond the authority of the government agents the scope of the quiet title action became narrowed. * * * The nature of the action remained the same and required *a determination of the need and use of Ahtanum waters as well as* the deraignment of title by defendants to the lands to

which any *conceded* water rights *secured* under the agreement became appurtenant. *However,* the initial issue for decision by *this* court following remand by the Court of Appeals * * * *was the precise nature and effect of the agreement of 1908 The scope of the adjudication obviously must be determined not only in accordance with the rights of the Indians under the Treaty of 1855 but more particularly as limited under the terms of the agreement conceding and surrendering these rights.* The Court of Appeals did not, *in my opinion, intend to fully* construe *or apply* the terms of the agreement *before the issues were framed or all the evidence adduced* but left this to the lower court. This the master has done. He has construed the agreement, correctly, as one between plaintiff and the north side water users as a group *without provision for allocation of water to specific tracts.*

*The principal issue thus becomes one of determining with reasonable exactness the volume of flow surrendered to the north side users in the aggregate. This determination under the general direction of the Court of Appeals is to be based upon evidence of title, need and use by the north side defendants as of 1908. For this purpose a tract by tract analysis is necessary to ascertain whether the beneficiaries and their successors claiming under the agreement had in fact sufficient ownership, need and use as to such tracts to justify an*

*award of the full volume of water conceded to them as a group. If proved as of 1908 and later titles are deraigned as well as need and use overall maintained to the extent that the entire 75% of the volume of water is still required that volume should be awarded to defendants collectively under the provisions of the agreement. If not, the volume of water to be awarded should be reduced in accord with the evidence, and the difference awarded plaintiff. Once plaintiff has been awarded its full share of the waters of Ahtanum Creek under the provisions of the agreement of 1908 no further issue remains for adjudication.* Consequently, there was no *reason or requirement* for the master or this court to adjudicate the rights of plaintiff as trustee for the Indians as against each individual defendant.

Having expressed my views as to the fundamental issues regarding the nature and effect of the 1908 agreement and the jurisdiction, authority and obligation of this court in this proceeding, I accept and *approve* the report of the master with modifications indicated — *i. e., It is unnecessary to hold the 1908 agreement to be a conveyance or to conclude that this court lacks jurisdiction to decree a tract by tract adjudication. The report, so far as it advances these propositions, I regard as surplusage.*

In accordance with these views the master's pro-

posed conclusions of law numbered 1, 2, 3 *and 4* should be revised to read as follows:

*1. That the agreement of May 9, 1908, a true copy of which is attached to the pretrial order herein, was entered into between the United States as trustee for the Yakima Tribe of Indians, as first party, and the north side users of the Ahtanum Creek waters, collectively, as second party. That said agreement was executed for the purpose of accomplishing a division of the Ahtanum Creek water in settlement of a then existing dispute as to their respective claims to the right to use said water. That a division of water of Ahtanum Creek was accomplished by the first party surrendering and conceding to the second party, in the aggregate, 75% of the water as measured in article three of the agreement, and the second party surrendering and conceding to the first party, in the aggregate, 25% of said water as so measured. That said agreement was and is valid and binding upon the parties thereto and their successors in interest.*

*2. That by surrendering and conceding 75% of Ahtanum Creek water the United States made that amount available, free of claim, to the lands of the north side water users. With respect to allocation to specific tracts on the north side of Ahtanum Creek the available water became appurtenant to those lands – not by virtue of the surrender and concession but by riparian*

*or appropriative rights under the laws of the State of Washington. That the judgment and decree of the superior court and the opinion of the Supreme Court of the State of Washington in the action entitled "In re Ahtanum Creek," 139 Wash. 84; 245 P. 758, are a valid and binding determination of the rights as among the respective land owners and water users on the north side of Ahtanum Creek and the defendants herein, and the decree therein is res adjudicata as to them. That said judgment and decree, and opinion, are not binding upon the plaintiff as to division of water between plaintiff and defendants.*

*3. That this water rights adjudication under the the issues as presented herein is restricted to a determination of plaintiff's rights to the waters of Ahtanum Creek, as originally reserved under the Treaty of 1855, so far as they were retained by the agreement of 1908, and a determination of defendants' rights, collectively, so far as they were fixed under said agreement. That these rights, under the terms of said agreement, are to be ascertained by measurement and by a percentage divsion, in the aggregate, of Ahtanum Creek waters as provided therein without an adjudication of waters to or for any particular tract of land.*

*4. That the plaintiff and the answering defendants have sufficiently deraigned their titles to lands benefited by the Waters of Ahtanum Creek under the pro-*

*visions of the agreement of 1908. That said parties have sufficiently proved needs as well as beneficial use of Ahtanum waters in 1908 and 1957 so that a precise measurement of the natural flow and a percentage division thereof, in the aggregate, of said waters may be made.*

## *REMAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW*

After having reviewed the pertinent testimony and exhibits appearing in the record I believe that the proposed findings of fact, remaining conclusions of law and decree are amply supported by the evidence and the law. With the exception of conclusions of law numbers 1, 2, 3, *and 4* I approve and *accept* them as to all issues, subject to modification in language for purposes of clarification.

I have scanned the testimony of Jensen, Starr, the exhibits introduced in support thereof, the testimony of the "old timers," the Code and Jacobs' reports, and the decree in the state water adjudication of Benton v. Johncox, 17 Wash. 277 (1897). A reading of the master's report discloses that the master relied primarily on this evidence, and to a lesser degree on Fiedler, in making his crucial findings on the tracts irrigated and the need in 1908 and 1957.

The Foxworthy testimony and exhibits in support

thereof *relating essentially to the geological formations in the Ahtanum Valley,* cited and relied upon by plaintiff's counsel, were not, in my opinion, as undisputed as contended in argument. Since it is opinion evidence *and particularly because of its nature* it need not be accepted by a trier of the facts.

To restate my decision, it is my conclusion that no proposed findings of fact excepted to by plaintiff is clearly erroneous.

*WASTE*

Some comment should be made as to the issue of waste. As I know, and as the master observed in his report, it became a major issue in this litigation after the Court of Appeals sustained the 1908 agreement, and an alternative attack upon the north side water users by plaintiff became necessary.

The issue of waste is essentially, if not wholly, one of fact. The evidence, as I have considered it in the record made before the master and as I have heard and observed it in the course of several proceedings before me, would, without doubt, have sustained a finding of waste by the master if we were concerned with the *usual water adjudication and* irrigation project or system. In my opinion the most impressive showing has been made with respect to the use of old, meandering natural channels for the conveyance of water and past

failure to provide effective control and measuring devices. However, the latter practice has now been substantially corrected and the master in his report has set forth in a logical and persuasive manner reasons justifying the use of what would appear to be an antiquated and inefficient irrigation system. It is my conclusion that I should not disturb his findings and conclusions on this issue. It would be unjust and unreasonable to have required defendants to establish a modern and efficient irrigation program or system in view of the long standing efforts of the government to take from these users the waters it so improvidently relinquished in 1908. Defendants' water rights have been and will continue to be in doubt until a decree in this litigation is entered and made final. Clearly, had all parties to this litigation approached the problem in a more cooperative and conciliatory manner much earlier a less costly and more satisfactory solution would have been found than can possibly develop from a court decree.

Nevertheless, at such time as a final decree adjudicating the rights of the parties is entered, assuming defendants are not thereby deprived of the water rights involved, this court may well consider an application by plaintiff for a showing by defendants as to why a more efficient water transportation and irrigation system should not be speedily constructed. Such application, it would seem to me, should be accompanied by

an offer of assistance on the part of plaintiff in the event the Indians are to obtain more water as a result.

Further proceedings in this matter will be in accordance with this decision on plaintiff's exceptions to the master's report and recommended findings of fact, conclusions of law, and decree.

Apart from plaintiff's motion to amend the pendente lite order, which has been continued until today for further hearing and disposition, there remains before me * * * plaintiff's *motion for judgment, dated August 25, 1959 and plaintiff's two groups of motions for judgment against certain individual defendants filed beginning June 2, 1960 and September 19, 1960. The August 25, 1960 motion was* made while the trial on the merits was before the master and no action was taken thereon by him. *However,* I have not considered them as included within the exceptions taken to his report and accompanying recommendation.

Counsel for plaintiff on several occasions has expressed a desire to be heard on these motions although I understand later it was decided to submit them on the briefs already filed without further oral argument.

If further argument is desired and will serve any purpose I will consider such a request. However, it appears to me that if I am to be consistent with the de-

cision I have just rendered such motions should be denied and an order entered so providing.

DATED July 6, 1961. REVISED January 26, 1962.

WILLIAM J. LINDBERG
United States District Judge

APPENDIX "F"

(R. 1107-1173)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, *Plaintiff* | ) | |
| v. | ) | No. 312 |
| AHTANUM IRRIGATION DISTRICT, et al, *Defendants.* | ) | |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for hearing before the Honorable William J. Lindberg, District Judge of the above-entitled court, upon the exceptions of the plaintiff to the report, proposed findings of fact, proposed conclusions of law and proposed decree of the Special Master filed herein, plaintiff appearing by counsel of record and defendants appearing by counsel of record, and briefs having been submitted by all parties and oral argument having been heard, and the court having examined and studied the files and records relating to the hearings before said Special Master and having thereafter rendered its revised memorandum decision in which the court determined to accept and approve the report, proposed findings, conclusions and decree of the Special Master

with modifications as set forth in said memorandum decision, and the court now being fully advised in the premises, hereby makes the following

## FINDINGS OF FACT

1.

That the complaint herein was filed July 2, 1947. That thereafter the matter came on for trial on August 1, 1951, before the then presiding Judge, James Alger Fee, evidence having been adduced, and the matters having been fully briefed and orally argued, The District Court therein entered on October 29, 1954, a judgment dismissing the plaintiff's complaint. That the plaintiff appealed said judgment of dismissal and the United States Court of Appeals for the Ninth Circuit on July 10, 1956, reversed and remanded the cause for further proceedings in this court not inconsistent with their opinion.

2.

That pursuant to the remand from the United States Court of Appeals for the Ninth Circuit, there was commenced on March 18, 1957, the Pendente Lite Hearing which continued subject to brief adjournments through the 17th day of April, 1957. That thereafter on May 17, 1957, the Special Master filed his Report and Recommendations upon the Pendente Lite Hearing and pursuant to such report and recommendations the

court entered its findings of fact, conclusions of law and Order Pendente Lite on the 10th day of June, 1957. That thereafter on April 4, 1958, the Order Pendente Lite was amended by stipulation among the parties, said stipulation pertaining to diversions ordered under said Pendente Lite Order and the measurements thereof. That the stipulation is by reference incorporated herein and made a part of these findings of fact.

3.

That on the 22nd day of July, 1957, the trial on the merits was commenced before the Special Master and that the proceeding continued subject to adjournments from time to time through the first day of November, 1958. That hearings were held for some 135 days. Final argument on the case took place on January 5, 6, 7 and 8, 1959.

The last full brief (Plaintiff's Reply Brief) was received on August 27, 1959, followed by Defendants' Supplemental Memorandum of Authorities on October 9, 1959. That the Special Master filed a comprehensive report, proposed findings of fact, conclusions of law, and proposed decree on April 15, 1960, together with a supporting record aggregating in excess of 15,000 pages of transcript and voluminous exhibits. That thereafter the plaintiff only filed extensive exceptions to the report of the Special Master and to his proposed findings, conclusions and decree, and defendants in due course filed

a brief and memorandum of points and authorities in answer to plaintiff's exceptions to which defendant, in turn, replied. That on November 2, 3, and 4, 1960, extensive oral arguments were heard by the court in support of and in oposition to plaintiff's said exceptions. That thereafter the court duly considered all of the foregoing and the files and records herein, including the transcript, exhibits and the report and proposed findings, conclusions and decree of the Special Master and on July 6, 1961, rendered and filed its memorandum decision herein.

4.

That Ahtanum Creek is the northern boundary of the Yakima Indian Reservation and it is a non-navigable stream rising on the eastern slope of the Cascade Mountains in the State of Washington; flowing thence slightly north a distance of about 40 miles and emptying into the Yakima River about 4 miles south of the City of Yakima, Washington. Two forks of that stream unite to form the main channel of Ahtanum Creek about 18 miles above the point where it enters the Yakima River. That there are no existing storage facilities on Ahtanum Creek for the purpose of irrigation.

5.

That all of the lands in the Ahtanum Valley are arid in character. That those lands must be irrigated with large quantities of water to make them productive.

That the yield of Ahtanum Creek is insufficient to adequately irrigate the lands either on the north or the south side of that stream. That the Klickitat River rises on the Yakima Indian Reservation and it is feasible from an engineering and physical standpoint to divert that water to the Ahtanum Valley.

6.

That gauging stations to measure the flow of water of Ahtanum Creek have been established on the north fork of that stream in the northwest quarter (NW 1/4) of Section 2, Township 12 North, Range 15, E. W. M.; on the south fork in the southwest quarter (SW 1/4) of Section 23, Township 12 North, Range 15 E. W. M., Yakima County, State of Washington; new headgates and measuring flumes have been built at the defendants' diversion works at Batchelor and Hatton Creeks.

7.

That the following principal diversions exist upon Ahtanum Creek:

(a) The Johncox Ditch diverts from a branch channel of the North Fork of the Ahtanum in the southeast quarter (SE 1/4) of the northeast quarter (NE 1/4) of Section 12, Township 12 North, Range 15 E. W. M., and serves defendant water users north of the creek.

(b) That the main B. I. A. (Bureau of Indian Affairs) Canal is located on the main stem of Ahtanum Creek in the southeast quarter (SE 1/4) of the northeast quarter (NE 1/4) of Section 14, Township 12 North, Range 16, E. W. M., and serves the Yakima Indian Reservation lands to the south of Ahtanum Creek. That said diversion is some nine miles below the two gauging stations.

(c) That Batchelor Creek branches off from the main stem of Ahtanum Creek to the north in the southeast quarter (SE 1/4) of the northwest quarter (NW 1/4) of Section 13, Township 12 North, Range 16 E. W. M. That it serves certain of the defendant water users.

(d) That Hatton Creek branches off the main stem of Ahtanum Creek to the north in the orthwest quarter (NW 1/4) of the southwest quarter (SW 1/4) of Section 18, Township 12, North, Range 17, E. W. M. That it serves certain of the defendant water users.

(e) That the lower B. I. A. (Bureau of Indian Affairs) diversion serving certain of the Yakima Indian Reservation lands, diverts from the main stem of Ahtanum Creek in the northeast quarter (NE 1/4) of the southeast

quarter (SE 1/4) of Section 7, Township 12 North, Range 18, E. W. M.

8.

(a) That situated upstream from the main canal of the Bureau of Indian Affairs on the main stem and South Fork of the Ahtanum within the Yakima Indian Reservation are five smaller diversions.

(b) That from the main B. I. A. Canal there are approximately 55 smaller diversions. That from the lower B. I. A. Canal there are approximately 12 smaller diversions.

(c) That situated north of Ahtanum Creek and on the tributaries of that stream there exist 117 diversions, including the principal diversions of the Johncox Ditch, Batchelor Creek and Hatton Creek.

9.

That by a Treaty dated June 9, 1855, between the United States of America and the Confederated Tribes of Yakima Indians, there was ceded to the United States a certain tract of land now in the State of Washington. By that Treaty there was reserved to the Yakima Tribe certain lands, including those here involved. That since the date of the Treaty, except alienated lands held in fee simple, lands so reserved by the Yakima Tribe had been held by the plaintiff for the Yakima Indians and are now known as the Yakima Indian Reservation. That the

northern boundary of the Yakima Indian Reservation is described as follows:

> "Commencing on the Yakima River at the mouth of the Ahtanum River; thence westerly along said Ahtanum River to the Forks; thence along the southern tributary of the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mt. Adams . . . . . "

That the lands on the Reservation side of Ahtanum Creek involved herein were originally allotted, according to law and regulations, to individual Indians.

10.

That titles to the lands on the north side of Ahtanum Creek here involved are deraigned through patents as provided by the laws of the United States of America and the laws of the State of Washington. Sections 16 and 36 of the several townships comprising the area north of Ahtanum Creek were granted by the United States of America as School lands, all as provided in the Enabling Act, pursuant to which the State of Washington was admitted to the Union.

11.

That water from the Ahtanum Creek was first utilized in the year 1847 by a small diversion of water on the north side of said Creek by the Oblate Fathers, Missionaries to the Indians. That in 1894 the Government began to furnish financial aid to the Indians. That the work of constructing the system of the Ahtanum Indian

Irrigation Projects was initiated August 6, 1908, and the work of construction was completed in the year 1915. That appropriation of water for general farming and irrigation use by predecessors in interest of some of the defendant water users began in the year 1852.

12.

That upon the 9th day of May, 1908, after extensive field study and investigation by W. H. Code, Chief Engineer of Irrigation of the Bureau of Indian Affairs, acting pursuant to direction from James R. Garfield, the then Secretary of Interior, a Memorandum of Agreement was entered into and signed by the said W. H. Code and approved on the 30th day of June, 1908, by Frank Pierce, First Assistant Secretary of the Interior, and by users and representatives of water users situated north of Ahtanum Creek. That such agreement generally provided for a division of the waters of Ahtanum Creek, 25% to the Indian Reservation on the south side and 75% to the water users located on the north side of Ahtanum Creek; that the agreement was based upon the then irrigated acres on both sides of Ahtanum Creek. That thereafter the agreement was recorded in the office of the Auditor of Yakima County, Washington, in Volume 72 of Deeds, on page 35.

13.

That there was entered on the 7th day of May, 1925, a Decree in the case entitled State of Washington, plain-

tiff, vs. Annie Wiley Achepohl, et al, defendants, in the Superior Court for Yakima County, State of Washington. That the decree in that case was affirmed by the Supreme Court of the State of Washington. That subsequent and pursuant to the entry of the decree in said case, the Supervisor of Hydraulics, now the Supervisor of Water Resources of the State of Washington, caused to be issued certificates of water rights appurtenant to the lands of the defendants herein located upon the north side of Ahtanum Creek.

14.

That the agreement of May 9, 1908, provided for the installation of headgates and suitable measuring devices when water was diverted from Ahtanum Creek or from the branches thereof. That the defendants are now substantially complying with said agreement.

15.

That the defendants have deraigned their titles to land and to their water rights through former owners who were parties to the agreement of May 9, 1908, as more particularly hereinafter set forth. That the defendants have established that their diversion requirements are 4.8 acre feet during the year 1957 and were 3.7 acre feet in the year 1908, with a continuous flow requirement of one-half miner's inch per acre during the irrigation season.

16.

That the names of the answering defendants and the description of the properties to be considered as determining the needs in gross of the defendant north side water users for irrigation water as of May 9, 1908, and the total amount thereof, and the needs of said land for year 1957, are as follows:

(Names and Descriptions omitted)

17.

That the total allowable diversion requirements for the lands of the defendants located north of Ahtanum Creek, in 1908, and in 1957, in cubic feet per second of continuous flow, at the rate of one-half miner's inch per acre are as follows:

(a) 1908 total allowable diversion requirements, based upon established acreage of 5,718 acres, is 57.18 cubic feet per second.

(b) 1957 total allowable diversion requirements, based upon established acreage of 5,801 acres, is 57.18 cubic feet per second.

18.

That the figures in Paragraph 17(b) above represent the present maximum allowable diversion requirements of the defendants, although they are less than actual existing needs of defendants.

19.

That the plaintiff has not shown a continuous, un-

interrupted use of more than 25% of the flow of Ahtanum Creek for any ten year period prior to the commencement of this action.

20.

That a daily setting of the headgates at the main and lower Bureau of Indian Affairs diversions is necessary to insure that the respective diversions are the proper percentages of the total flow of Ahtanum Creek as measured at the north and south fork gauging stations. That daily measurements of the flow of the creeks at the north and south fork gauging stations are necessary and required. That weekly stream gauge measurements at such gauging stations are necessary and required for the maintenance of an accurate correction curve at said gauging stations.

21.

That there is sufficient acreage on both sides of Ahtanum Creek dependent upon that Creek for irrigation waters to insure that water allocated in accordance with these findings of fact can be put to a beneficial agricultural use.

22.

That some of the defendants use meandering natural streams, including Batchelor and Hatton Creeks for the transportation of irrigation water; that there is no proof under the evidence that this unreasonably wastes water

and the use of such natural streams for the transportation of water is a common irrigation practice and in accordance with the laws of the State of Washington.

23.

That spring is a time of high water run-off and occasional flooding in the Ahtanum Valley; that the north side of Ahtanum Creek occupied by the defendants, takes almost the entire brunt of this high water run-off and flooding, because of the physical characteristics of Ahtanum Valley; that the presence of natural stream channels, such as Batchelor and Hatton Creeks, is both desirable and necessary to carry such high water run-off. That the use of such channels for irrigation utilizes the maximum return flow and is therefore economical and not wasteful. That any waste which occurs by virtue of the use, measurement, diversion or transportation of irrigation waters in the main stem of Ahtanum is substantially the same on both sides of Ahtanum Creek and the court finds that allowable losses occur on both sides by reason of the joint use as a carrier of irrigation water of the main stem of Ahtanum and therefore no action should be taken concerning the same.

24.

That weirs or other measuring devices are necessary to determine the flow of water at all diversions from canals or streams where Ahtanum water is used; that headgates or other control devices are necessary at all

diversions on canals or streams where Ahtanum water is used, except that such headgates are not required at the intakes of Hatton and Batchelor Creeks. That the defendants have, however, constructed new headgates and measuring flumes at the intakes of Hatton and Batchelor Creeks in the years of 1960 and 1959, respectively.

25.

That both plaintiff and defendants dam or obstruct the channel of streams to assist diversion; that such obstructions serve a useful purpose and there is no proof that they unreasonably waste water.

26.

That marshy, boggy areas exist on both sides of Ahtanum Creek; that such areas are not necessarily related to waste of irrigation water, and there is no proof that they are so related in the Ahtanum Valley.

27.

That phreatophytes or water loving plants exist on both sides of Ahtanum Creek; that such plants serve a useful purpose in binding creek banks and providing shade; that they are not necessarily related to waste of irrigation water and there is no proof that they are so related.

28.

That water has been permitted to run uncontrolled

during the high water season and at times of sudden flash floods in areas north of Ahtanum Creek. That this does not constitute waste of irrigation water.

29.

That the ground waters exist in Ahtanum Valley on both sides of Ahtanum Creek and are available to both the plaintiff and the defendants. That water users on both sides of Ahtanum Creek utilize such ground waters to a very limited extent but there is no evidence of the quantity of ground water available upon either side of Ahtanum Creek and no finding can therefore be made as to such quantity except that it may be used as a supplemental supply for irrigation for a portion of the season after the available surface water has fallen to a low level.

30.

That no proof exists as to excessive losses in transportation or application of water, because of soil conditions. That it is economically feasible to irrigate lands of defendants as to which plaintiff claimed excessive losses.

31.

That no effective measurement of return flow or seepage in the main channel of Ahtanum Creek, within the meaning of Article 3 of the 1908 Agreement has been submitted to the court. That defendants in their proposed decree, have conceded that plaintiff is entitled

for its lower B. I. A. diversion, to a flow of water representing 5% of the total flow of Ahtanum Creek as measured at the north and south fork gauging stations, in addition to the overall percentage division between plaintiff and defendants.

32.

That statement of agreed facts, entered into by the parties, and set forth in the Order on Pretrial on the Merits in this case, is incorporated herein by reference, as though fully set forth.

33.

That the divisions of water contained in the pendente lite order, presently in force, would cause less dislocation if continued until the completion of any appeal in this case. That the divisions set forth in the present decree, if given immediate effect, would upset the status quo in advance of final determination of the issues herein.

From the foregoing Findings of Fact, the court makes the following

## CONCLUSIONS OF LAW

1.

That the agreement of May 9, 1908, a true copy of which is attached to the pretrial order herein, was entered into between the United States as trustee for the Yakima Tribe of Indians, as first party, and the north

side users of the Ahtanum Creek waters, collectively, as second party. That said agreement was executed for the purpose of accomplishing a division of the Ahtanum Creek water in settlement of a then existing dispute as to their respective claims to the right to use said water. That a division of water of Ahtanum Creek was accomplished by the first party surrendering and conceding to the second party, in the aggregate, 75% of the water as measured in article three of the agreement, and the second party surrendering and conceding to the first party, in the aggregate, 25% of said water as so measured. That said agreement was and is valid and binding upon the parties thereto and their successors in interest.

2.

That by surrendering and conceding 75% of Ahtanum Creek water the United States made that amount available, free of claim, to the lands of the north side water users. With respect to allocation to specific tracts on the north side of Ahtanum Creek the available water became appurtenant to those lands -- not by virtue of the surrender and concession but by riparian or appropriative rights under the laws of the State of Washington. That the judgment and decree of the superior court and the opinion of the Supreme Court of the State of Washington in the action entitled "In re Ahtanum Creek," 139 Wash. 84; 245 P. 758, are a valid and binding determination of the rights as among the respective land

owners and water users on the north side of Ahtanum Creek and the defendants herein, and the decree therein is res adjudicata as to them. That said judgment and decree, and opinion, are not binding upon the plaintiff as to division of water between plaintiff and defendants.

3.

That this water rights adjudication under the issues as presented herein is restricted to a determination of plaintiff's rights to the waters of Ahtanum Creek, as originally reserved under the Treaty of 1855, so far as they were retained by the agreement of 1908, and a determination of defendants' rights, collectively, so far as they were fixed under said agreement. That these rights, under the terms of said agreement, are to be ascertained by the measurement and by a percentage division, in the aggregate, of Ahtanum Creek waters as provided therein without an adjudication of waters to or for any particular tract of land.

4.

That the plaintiff and the answering defendants have sufficiently deraigned their titles to lands benefited by the waters of Ahtanum Creek under the provisions of the agreement of 1908. That said parties have sufficiently proved needs as well as beneficial use of Ahtanum waters in 1908 and 1957 so that a precise measurement of the natural flow and a percentage division thereof, in the aggregate, of said waters may be made.

5.

That defendants are entitled to divert from Ahtanum Creek, for use of their lands north of the creek, seventy-five percent of the natural flow as measured at the north and south fork gauging stations, provided that the total diversion for this purpose shall not exceed 57.2 cubic feet per second. Defendants shall have the right to use any excess flow above this figure, but only in subordination to the superior rights of plaintiff.

6.

That plaintiff is entitled to divert from Ahtanum Creek for use on lands south of said creek, twenty-five percent and no more, of the flow as measured at the north and south fork gauging stations when the flow as so measured is 76.3 cubic feet per second, or less which shall be for all diversions except the lower B. I. A. diversion. That plaintiff is entitled to divert the excess above that flow of 76.3 cubic feet per second, as measured at the north and south fork stations, to the extent that it can put it to a beneficial use, but shall not divert any excess which cannot be beneficially used. That in addition to the above percentage, plaintiff is entitled to divert, for the lower B. I. A. diversion, a flow of water equal to five per cent of the flow of Ahtanum Creek as measured at the north and south fork gauging stations. That defendants' right to divert the percentage of water set forth in Paragraph 5 above, is dependent upon their

supplementing the return flow in the main channel of Ahtanum Creek, where necessary to provide the stated percentage at the lower B. I. A. Diversion.

7.

That daily measurements of correct flows of Ahtanum Creek at the north and south fork gauging stations are required, and are justified under the 1908 Agreement, and that daily settings of the gates at both the main and lower Bureau of Indian Affairs Canals, for division of the waters of Ahtanum Creek will commence when necessary to insure the percentage water divisions set forth herein.

8.

That the plaintiff has established no right to the diversions of water of Ahtanum Creek beyond 25% thereof by reason of laches or prescription.

9.

That the plaintiff is not entitled to a decree against the defendants concerning waste of irrigation water on the north side of Ahtanum Creek and the defendants are not entitled to a decree concerning waste on the south side of Ahtanum Creek.

10.

That the Pendente Lite Order June 10, 1957, as supplemented by the stipulation of April 4, 1958, shall remain in effect, and govern the diversions to be made

from Ahtanum Creek by the respective parties until the decree in this cause on the merits has become final on appeal or by the expiration of the time for appeal if none is taken.

11.

That this court cannot make any determination by reason of failure of proof as to the quantity of ground waters available upon either side of Ahtanum Creek. That ground waters, if available, are a supplemental supply used for an extremely limited period during the low water season and cannot be considered in determining the division of water of Ahtanum Creek in this cause. That no determination can be made as to the availability of water through the Klickitat River water shed to satisfy the need of the south side of Ahtanum Creek. That occasional supplemental water developed by the parties should not operate to cut off rights to the waters of Ahtanum Creek.

12.

That the defendants are required to comply with the contract of May 9, 1908, and the laws of the State of Washington pertaining to the installation and maintenance of headgates ad weirs or other suitable measuring devices and the plaintiffs are likewise required to comply with the contract pertaining to the installation and maintenance of headgates and weirs or other suitable measuring devices for diversion of the waters of Ahtanum

Creek; Provided, however, that this provision shall not apply to installation of headgates at the intakes of Batchelor and Hatton Creeks, although same have actually been installed by the defendant.

13.

That the "Class III Defendants" – the successors in interest of the original allottees of lands on the Yakima Indian Reservation south of Ahtanum Creek – have lost no rights to the use of water and are entitled to participate rateably in the use of Ahtanum water awarded plaintiff as trustee.

DONE this 30th day of January, 1962.

/s/ William J. Lindberg
Judge

Presented by:
Fred Palmer
John Gavin
*Counsel for Defendants*

APPENDIX "G"

(R. 1174-1177)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff,* *vs.* AHTANUM IRRIGATION DISTRICT, et al, *Defendants.* | No. 312 |

DECREE

The above-entitled matter having come on regularly for hearing before the Honorable William J. Lindberg, District Judge of the above-entitled court, upon the exceptions of the plaintiff to the report, proposed findings of fact, proposed conclusions of law and proposed decree of the Special Master filed herein, plaintiff appearing by counsel of record, and briefs having been submitted by all parties and oral argument having been heard, and the court having examined and studied the files and records relating to the hearings before said Special Master and having thereafter rendered its revised memorandum decision in which the court determined to accept and approve the report, proposed findings, conclusions and decree of the Special Master with modifications as set forth in said memorandum decision,

and the court having made and entered herein its findings of fact and conclusions of law and being fully advised in the premises; now, therefore,

IT IS ORDERED, ADJUDGED and DECREED that the waters of Ahtanum Creek shall be and they are hereby divided between the parties to this action as follows:

a. To defendants, for use on their lands north of Ahtanum Creek, seventy-five percent of the natural flow of Ahtanum Creek, as measured at the north and south fork gauging stations, provided that when the said measured flow exceeds 76.3 cubic feet per second, defendants shall have no rights to the excess, except in subordination to the higher rights of the plaintiff.

b. To plaintiff, for use on Indian Reservation lands south of Ahtanum Creek, twenty-five percent of the natural flow of Ahtanum Creek, as measured at the north and south fork gauging stations; provided that when that natural flow as so measured exceeds 76.3 cubic feet per second, all the excess over that figure is awarded to plaintiff, to the extent that the said water can be put to a beneficial use.

c. Plaintiff may divert such water from the south fork of Ahtanum Creek as can be beneficially

used for the individual diversions into the Yakima Indian Reservation lying above the main Bureau of Indian Affairs diversion; provided, however, that the water diverted to such individual diversions shall be charged against and deducted from the over-all award set forth in (b) above.

d. To the plaintiff, for the lower Bureau of Indian Affairs diversion, a daily diversion of water representing five percent of the natural flow of Ahtanum Creek as measured at the north and south fork gauging stations. This award shall represent plaintiff's interest in the return flow of the main stem of Ahtanum Creek, and the award to defendants shall be conditioned upon plaintiff receiving this flow of water at the lower Bureau of Indian Affairs diversion.

e. To defendants, all the rest of the return flow in the main stem of Ahtanum Creek, and all the return flow in Hatton and Batchelor Creeks.

f. Any water loss which may occur between the north and south fork gauging stations, and the defendants Hatton Creek diversion, is to be absorbed by defendants; plaintiff being entitled to its full stated percentage of the measured flow, and defendants taking the balance.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that daily measurements of the flow of the creeks shall be made at the north and south fork gauging stations. Weekly stream gauge measurements shall be made at the north and south fork gauging stations, and an accurate correction curve shall be maintained for each of said gauging stations. Daily adjustments of diversion works off the main stem of Ahtanum Creek, and off the north and south forks, shall be made to effectuate the percentages heretofore awarded.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that no water shall be taken by any of the parties hereto from Ahtanum Creek, Batchelor Creek, Hatton Creek or any other main diversion canal or stream carrying Ahtanum water unless an effective weir or other measuring device is installed to measure the water so taken; that, except for the intakes of Batchelor Creek and Hatton Creek, no water shall be taken by any of the parties hereto from Ahtanum Creek, Batchelor Creek, Hatton Creek or any other main diversion canal or stream carrying Ahtanum water, unless a substantial headgate or other control device is installed to control the water so taken.

IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the Class III defendants herein are not barred from sharing rateably in the water awarded plaintiff, in accordance with such rules as plaintiff may adopt;

that this court, however, makes no order regarding water rights of any individuals north or south of Ahtanum Creek.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the pendente lite order of June 10, 1957, as amended by the stipulation of the parties on April 4, 1958, shall remain in full force and effect until the decree in this cause on the merits has become final on appeal or by the expiration of the time for appeal, if none is taken.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that title is hereby quieted in the respective parties, to the percentages of flow and amounts of Ahtanum Creek water set forth in this decree.

DONE this 30th day of January, 1962.

/s/ William J. Lindberg
United States District Judge

Presented by:
Fred Palmer
John Gavin
*Counsel for Defendants*

APPENDIX "H"

(R. 1040-1042)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff,* vs. AHTANUM IRRIGATION DISTRICT, et al, *Defendants.* | No. 312 |

## OBJECTIONS OF DEFENDANTS TO COURT'S CONCLUSIONS OF LAW AND DEFENDANTS' PROPOSED ALTERNATIVE CONCLUSIONS OF LAW

COME NOW the defendants and respectfully object to the entry by the court herein of its proposed Conclusions of Law numbered 1 and 3 upon the grounds and for the reasons that said proposed Conclusions of Law numbered 1 and 3 are legally erroneous and are not supported or justified under the findings of fact and the record of the evidence herein. Said Conclusions of Law numbered 1 and 3 which the court proposes to enter are as follows:

1.

"That the Agreement of May 9, 1908, is a contract of settlement whereby the north side water users, who

are parties to that agreement, and their successors in interest, are limited to the defined amount of 75% of the natural flow of Ahtanum Creek; that such agreement limits the south side water users, through the United States of America, to the defined amount of 25% of the natural flow of Ahtanum Creek; that said contract is valid and binding upon all parties to this litigation and their successors in interest."

3.

"That the rights, duties and liabilities of the parties to be adjudicated by this court are limited to the issue of a percentage division of the flow of Ahtanum Creek between the north side water users, as a group, and the south side water users, through the United States of America."

IN THE ALTERNATIVE and in lieu of the foregoing Conclusions of Law, the defendants respectfully request that the court make and enter the following Conclusions of Law as proposed by the Special Master and which are legally correct and are supported by the findings of fact and by the evidence as appears from the briefs previously filed herein:

1.

"That the Agreement of May 9, 1908, is a contract providing for the division of the water of Ahtanum Creek and a conveyance of 75% of the waters of Ahtanum Creek

to the north side water users who are parties to that agreement, and their successors in interest; that such agreement is a conveyance to the south side water users, through the United States of America, of 25% of the waters of Ahtanum Creek; that said contract is valid and binding upon all parties to this litigation and their successors in interest."

3.

"That this court has no authority to adjudicates the rights, duties and liabilities of the parties hereto except as the issues are presented in this cause, and that the issue is percentage division of the flows of Ahtanum Creek between the north side water users and the south side water users and there is no right or duty on the part of this court to adjudicate waters to or for any particular tract of land. That to do so would exceed the jurisdiction of this court and usurp the jurisdiction of the courts of the State of Washington."

DATED THIS 2nd day of August, 1961.

Fred Palmer
John Gavin
*Counsel for Defendants*

Copy of foregoing Objections and Proposed Alternative Conclusions mailed to William H. Veeder, Assistant Attorney General, this 1st day of Aug, 1961.

APPENDIX "I"

330 F. (2d) 897

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,
*Appellant,*

*vs.*

AHTANUM IRRIGATION DISTRICT,
a corporation, et al.,
*Appellees.*

No. 17,997

[Mar. 18, 1964]

Appeal from the District Court of the United States
for the Eastern District of Washington,
Southern Division.

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Before: CHAMBERS, POPE and MERRILL, Circuit Judges. POPE, Circuit Judge.

This case is here for the second time. On the first appeal from a judgment dismissing the action which was brought by the United States against numerous individuals claiming the right to use water from Ahtanum Creek in the State of Washington this court reversed the judgment and remanded the cause for trial upon answers to be filed and issues to be made in the court below. United States v. Ahtanum Irrigation District, 236 F. 2d 321 (1956).

We shall not here repeat much of what was said in our earlier decision as we assume complete familiarity with it and in consequence thereof an understanding of the facts which led to the prior appeal. As there noted, Ahtanum Creek constitutes a part of the north boundary of the Yakima Indian Reservation which was created by the Treaty with the Yakima Nation of Indians, June 9, 1855, 12 Stat. 951. This court held that by reason of the rules laid down in Winters v. United States, 207 U.S. 564, and other decisions of this cou applying the rule of the Winters case, including Conrad Inv. Co. v. United States, 161 F. 829, and United States v. Walker River Co., 104 F. 2d 334, all of the waters of Ahtanum Creek, or so much thereof as could be beneficially used on the Indian Reservation were, by virtue of the treaty, reserved for use by the Indian tribe upon their lands. [1]

The record then before us showed that by 1915, the Indian Irrigation Service had completed the construction of irrigation canals and ditches and other works sufficient to provide irrigation water for approximately 5000 acres on the Indian Reservation. We held that as of 1915, in the ordinary course, the Indian tribe and the owners and possessors of their land would be entitled to the right to the waters of Ahtanum Creek meas-

[1] For a recent reaffirmation of the rule of the Winters case see Arizona v. California, 373 U.S. 546, 600.

ured by the needs of the Indian irrigation project at that date.

The main problem presented by the previous record in the case arose out of the fact that in 1908 Chief Engineer Code of the Indian Bureau executed an agreement, dated May 9, 1908, between the United States, on the one hand, and a large number of white users of water from Ahtanum Creek, who owned and were located on lands north and outside of the Indian Reservation, on the other. The terms of that agreement are set out in our former opinion where it is discussed at great length. Its main provision purported to limit and define the claim of the United States, as trustee for the Indians, of the waters of Ahtanum Creek to 25 per cent of the natural flow of the Creek, and to assign 75 per cent of the natural flow to the white landowners who were parties to and executed the said agreement. All of them purported to claim rights in and to the waters of the stream. The agreement was approved by the Secretary of the Interior.

We upheld the validity of the agreement, basing our determination in that regard upon our construction of the agreement itself, and our determination that the white landowners may have acquired some rights in the waters of the stream. Dealing with the contention of the United States that the Secretary of the Interior was without power to make such an agreement, we held that the

Secretary in making it was undertaking to "deal with certain relations between the Indians on one hand and their white neighbors on the other." [2]

We went on to say: "The rights of the white settlers to the use of the waters were subordinate to the rights of the Indians, but they were not nonexistent. Until the Indians were able to make use of the waters there was no legal obstacle to the use of those waters by the white settlers. And after the Indian irrigation works were completed, there would still be the right of the non-Indian appropriators to make use of any surplus available within the stream." 236 F. 2d at 335. We think this made it plain that in executing the 1908 agreement, and in determining whether there was authority to make it, the Secretary necessarily considered, as did we, that the white settlers had water rights (necessarily acquired under local law) which, while subordinate to the rights of the Indians, were still "not nonexistent".

We held that the action should not have been dismissed since the suit was one to procure an adjudication

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[2] We said (p. 335): "The management of any parcel of land necessarily involves some degree of occasional adjustment of the rights of the owner in relation to and concerning adjoining landowners; arrangements for the location and erection of boundary fences, and repair and maintenance of those fences are illustrations of this. More specifically we have here the case of a stream which formed the boundary between the Indian reservation and the outside public lands, and which public lands were open to entry by white settlers."

of water rights and was "in its purpose and effect one to quiet title to realty" and that it presented claims and issues which required the court to determine and adjudicate the extent of the rights of the parties with respect to the waters of the stream. Obviously those rights, so far as the Indians were concerned, arose from the provisions of the treaty, and so far as the rights of the defendants were concerned, arose under the laws of the State of Washington. We said that the defendants should have been required to appear by answer and set forth "their claims of right to the use of the waters of the stream"; we criticized the answers previously filed for not having disclosed "who these water users are, what lands they claim and have the right to irrigate, or how they deraign their title to any water rights" and directed that on remand the court must "determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles", and that appropriate answers must be required from all defendants.

We also proceeded to construe the meaning of the agreement of 1908 by way of giving directions as to the issues and questions to be determined upon remand. We shall have occasion to refer to these hereafter.

We assumed that on remand of this case the defendants would by answer set forth their claimed rights to the use of water, how those rights were deraigned,

and what lands they claimed the right to irrigate; it was plain that the only water rights which the court would be required to measure and ascertain would be the water rights of the specific individuals who entered into the 1908 agreement. As we said, that agreement was not made between Engineer Code and all citizens of the State of Washington;—it was made with specified individuals, and that their right to the use of 75 per cent of the waters must have been limited to their need as of 1908.

At the trial below the defendants proceeded initially to conform to the directions given by the court. They filed numerous answers setting forth, as we had directed, "who these water users are, the lands they claim to have the right to irrigate, and how they deraigned their titles to any water rights," and generally set forth their claims to water rights in the stream as to the various dates of acquisition. [3]

To support the allegations of these answers the de-

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[3] For instance, the answer of the defendant Kenneth P. Bates and wife set forth the land which they owned, by legal description; it stated that they had deraigned title thereto from Catherine Lynch who was a signer of the agreement of 1908; they claimed for the irrigation of such land 146 inches of waters of Ahtanum Creek alleged to have priority of use as of 1866; and that prior to the year 1908, and at all times since, the said premises were all being irrigated, were susceptible of irrigation, and could beneficially use the quantity of water mentioned when available from the flow of the Ahtanum Creek.

fendants called numerous witnesses who testified respecting the use of the waters of Ahtanum Creek upon the various tracts of land involved as of the year 1908, when the agreement was executed.[4] These were witnesses who were familiar with the land in question and Ahtanum Creek in the years 1907-1908; — generally neighbors residing in the vicinity of the property at that time and who testified that they knew about the irrigation of the lands set forth in the answers.[5]

Although a very substantial amount of similar testi-

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[4] This type of proof was appropriate in view of our previous decision to the effect that "the right to the use of 75 per cent of the waters must have been limited to the needs as of 1908 of the particular individuals who were parties to the agreement;" and also, that "their interest as of 1908 were necessarily limited to their then interest and the subsequent uses or ownerships could not enlarge their rights under the arrangement for the division of these waters."

[5] Thus, in support of the allegations of the Bates' answer, (note 2, supra) two witnesses were called, each one testifying with respect to one of the two parcels described in that answer. Witness Hatton testified that he was acquainted with parcel one, there described, in 1907-1908; he had been a neighbor, owning land a half mile distant; he had observed the Bates parcel in 1907-1908, and was familiar with the crops growing thereon; it was hay and grain and "there was lots of brush on the place, lots of waste land;" it got its water from Ahtanum Creek through open ditches; he could not state whether there was any alfalfa growing there; he remembered the acres under irrigation in 1907-1908 as 40 acres; he testified that more land on that property was irrigated at the present time than in 1907-1908.

Similarly witness Spon testified as to Bates parcel No. 2. He had been a neighbor; he knew that that parcel was irrigated in 1907-1908; hay and grain were the crops; the water came from Ahtanum Creek, and he remembered that the number of acres then irrigated was 40 acres; he did not know about the irrigation there after 1918.

mony was offered with respect to the lands owned or claimed by the various defendants, and although the trial court found which lands were actually using water in 1908, the acreage irrigated on each parcel, and the duty of water, it made no formal conclusions as to the extent or validity of the water rights of defendants or their predecessors as of 1908. While there was no testimony as to the dates when water was initially diverted for these lands, the conclusion seems plain that if these lands were, as found, actually being irrigated in 1908, their owners then had acquired water rights, subject, of course, to the rights of the Indians.

On remand the case was referred to a special master who made a report and recommended findings which in general were approved and accepted by the trial court. The master made no determination as to water rights as such, or as to the existence or validity of such rights under the Washington law, whether based on appropriation or by virtue of riparian location.

It appears that the master, disregarding our prior admonition that the water rights of these owners claimed as of 1908 must be set up in the answer and determined by the court, was unduly impressed by the language which we used to the effect that the water rights are necessarily limited by the *needs* of the owners as of 1908. In no manner did our former opinion state that the rights of the defendants were as great as their needs for water.

Our reference to needs was a reference to a *limitation* upon the extent of the water rights.

Obviously we contemplated that in each case the defendant must establish that he had a right for a stated quantity or amount of water; that he must establish how he acquired it; and that this in turn could not exceed his needs. The report accompanying the master's proposed findings discloses his misapprehension of our holding. Thus the report states: "This conclusion refers to *need,* of course; it is not believed there was enough water in the creek to supply this much water per acre in the low water period of 1908."

Rejecting the proposition that the quantity of water actually being used by the defendants or their purchasers in 1908 was important, the master said: "Plaintiff's view, that the needs of the north side parties to the 1908 Agreement, mean the quantity of water actually being applied by them at that time to a beneficial use, is not persuasive. Need and use are not the same things. It would be possible for water users to *need* far more water than they *used* in a particular period. If the 1908 *use* determined the north side's 1908 *need,* the quantity of snow which fell in the mountains the preceding winter would determine the farmer's need for water; and if a drought had occurred that year, it would mean the north side farmers needed little water (since, having little available, they would have used little). The amount of water

actually put to a beneficial use in the face of abundant water supplies, could well be an accurate indication of need. Since the Ahtanum Valley does not have abundant water supplies, the suggested test is not valid." (The emphasis is that of the master.)

We think it is apparent that the master may have been misled by his own misinterpretation of the import and significance of the 1908 agreement. His report analyzed the 1908 agreement in the following manner: "It is believed than an analysis completely independent of the Court of Appeals' opinion, would result in the same conclusion—that the Agreement of 1908 constitutes an effective conveyance of the rights to 75% of the waters of Ahtanum Creek (both natural and return flow)." [6]

This conclusion of the master that the agreement of 1908 operated as an instrument of conveyance whereby certain waters held by the United States in trust for the Indian tribe were conveyed to the other parties to the agreement, was rejected by the district judge when the master's report came up before him on exceptions thereto. The judge held that the agreement was neither a conveyance nor a contract to convey an interest in the

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[6] He proceeded to recite that questions concerning real property are governed by the law of the state; that under the law of Washington the deed does not have to follow a specific statutory form but that the 1908 agreement contained words of grant "granting and conceding" to the party "all rights heretofore claimed"; and said: "This holding clearly imports a grant, a transfer of rights."

water rights of Ahtanum Creek, saying: "In my opinion, the most reasonable characterization to be placed upon the 1908 agreement is that it was an agreement whereby the parties settled a dispute as to their respective water rights in the creek and as such is similar in legal effect to the well known 'boundary line agreement'. Bree v. Wheeler, 87 Pac. 255 (Cal. 1906). This conclusion is based upon a consideration of case authority dealing with this issue, the agreement itself, and the known objectives the parties were attempting to accomplish by entering into this agreement. An agreement of this type, favored in the law as it operates to settle disputes, does not convey title to either party but merely establishes their respective rights."

In thus disagreeing with the master's version of the 1908 agreement the judge was eminently correct. The most difficult question presented to us on the former hearing was whether it could be said that the Secretary had power or authority to approve the 1908 agreement. The opinion itself adequately discloses the laborious manner in which we were obliged to deal with that question. We finally concluded that because of the general powers of supervision and management vested in the Secretary he could approve that agreement as one designed to make a peaceful arrangement for a practical mode of use of the waters of the stream. We compared the type of arrangement th[illegible] involved with other types

generally involving some degree of occasional adjustment of rights of the owner in relation to an adjacent landowner and mentioned arrangements for the location and erection of boundary fences. [7]

As our original opinion shows, our finding that the Secretary had these powers of management was in turn based upon another premise which was that at the time in question the white settlers had some water rights which, although subordinate to the rights of the Indians, "were not non-existent". In short, our conclusion that the Secretary had this power was predicated upon our holding that the white settlers might in fact have water rights in and to the stream. [8]

We are not now called upon to express any opinion upon a purely hypothetical problem, but it must be plain from our original opinion that if we had been called upon to uphold the power of the Secretary of the Interior to make a conveyance of the waters of Ahtanum Creek to these white landowners we would have been confronted

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[7] The Government criticizes the district judge's reference to a "boundary line agreement" on the ground that no boundary was involved here. When we referred to boundary fences we did so only by way of analogy and undoubtedly that is what the district judge had in mind when referring to a boundary agreement.

[8] In 1908, of course, the Indian Bureau was diverting a very limited amount of these waters as the main diversion system was not completed until 1915.

with a very serious question indeed;—a much more difficult question than that which we decided.

The master's erroneous assumption that the 1908 agreement amounted to a conveyance of 75 per cent of the waters of the Ahtanum Creek to the white settlers who were parties thereto led to his adoption of a solution which was wholly beyond the contemplation of our original decision. It produced for the master's report a deceptively simple result. With his misconstruction of our references to "needs" of the various water right owners he came to the conclusion that roughly speaking what the Government had done was to turn over, *en masse* and in gross, this 75 per cent of all these waters, unrelated to any particular parcel of land, and unrelated to proof of water rights under Washington law, with the assumption that if it could be proven that present owners of the lands owned by the signatories to the agreement need all that water and if the owners had need of all that water in 1908, they could have it all.

Of course in a broad sense any land in an arid area such as the Ahtanum valley needs all the water it can get and use beneficially. The master found that in 1908, 5718 acres constituting portions of defendants' properties were under irrigation, and that in 1957 there were 5801 acres under irrigation. He also found that the duty of water for supplying these lands was ½ miner's inch per acre during the irrigation season. Calculating the irri-

gation season as extending from the first of May through the last of October, 184 days, and computing 50 inches of water as the equivalent of a second foot, he calculated the amount which would be diverted by such a continuous flow of ½ inch to the acre as producing 3.7 acre feet per acre in the year 1908. Converting the ½ miner's inch per acre to cubic feet per second he found that "1908 total allowable diversion requirements, based upon established acreage of 5718 acres, is 57.18 cubic feet per second." Pressing his theory as to the significance of the "needs" of the defendants, the master found that these allowable diversion requirements were actually less than the existing needs of the defendants.

As we have noted, although the district judge disagreed with the master's basic premise that the 1908 agrement amounted to a conveyance to the parties to that agreement of 75 per cent of all the waters of Ahtanum Creek, he nevertheless adopted the findings and conclusions of the master without noting that the master had completely misconstrued the import of our original decision. The judge, like the master, failed to make any determination as to the extent and limitation upon the water rights of the defendants in the waters of Ahtanum Creek under Washington law as of the year 1908.

The result of the master's findings, as adopted by the court, is a determination that by and through the 1908 agreement, the United States, as trustee for the In-

dians, handed over to the white settler parties to that agreement a flat 75 per cent of the stream flow but subject to the implied limitation that this referred only to the rights existing as of 1908 and as limited by the needs under those water rights. Nowhere in this record is there a determination as to the extent of the water rights of those parties to the 1908 agreement.

Under the theory of the master and of the trial court, the primary inquiry was whether these landowners needed certain amounts of water; and concluding that they needed the full 75 per cent of the natural flow of the stream, the court awarded them that amount, subject only to the limitation that their use could not exceed one half inch to the acre, or 57.18 cubic feet for their entire acreage. We have noted heretofore that the master was not interested in making an inquiry as to how much water these parties actually used for he was careful to note that "need and use are not the same things" and his report stated, as indicated above, "This conclusion rerers to *need*, of course; it is not believed there was enough water in the Creek to supply this much water per acre in low water period of 1908. If the supply had been there, however, this much water could have been used, and would have been needed."

The master's findings obviously related to a hypothetical situation; and the conclusion is irresistible that the master arrived at his conclusions as to needs in 1908

by assuming that they were the same needs then as the needs in 1957. We shall note shortly that under Washington law the water right of any kind, whether appropriative or riparian, cannot be ascertained apart from an inquiry as to the use made of water by the claimant thereto.

The record does however contain a substantial amount of evidence from which, on the basis of the findings made, we can determine the extent and character of the water rights of the parties to the 1908 agreement in that year. In judging as to the effect of this evidence we must bear in mind the law of Washington relating to water rights. It is plain that under Washington law water rights could be acquired either by appropriation or by virtue of ownership of riparian lands. To perfect an appropriation under the rules applicable in most western states, including the State of Washington, the user must apply the water to a beneficial use with intent to appropriate. The beneficial use is the test and the measure of an appropriative right. As stated by the Supreme Court of Washington: "An appropriation of water consists of an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use." In re Alpowa Creek, 129 Wash. 9, 13, 224 Pac. 29.

For the purpose of our decision it is of no consequence whether the rights which are for adjudication

here are appropriative rights or riparian rights. The settled law in the State of Washington is that riparian rights, their existence and continuation, are, like appropriative rights, dependent upon beneficial use. Departing somewhat from its earlier decisions, the Supreme Court of Washington in 1923, in the case of Brown v. Chase, 125 Wash. 542, 553, 217 Pac. 23, said: " . . . we are now prepared to declare, instead of the mere loose and general expressions in some of our opinions, that: (1) Waters of nonnavigable streams in excess of the amount which can be beneficially used, either directly or prospectively within a reasonable time, on or in connection with riparian lands, are subject to approriation for use on nonriparian lands."

Although the Brown v. Chase decision came later than the year 1908, with which year we are primarily interested here, the determination as to the rights of riparian proprietors in that case was a declaration not of new law created by statute, but of pre-existing law in the State of Washington. The rule of the case has been followed consistently. In 1925, in State v. American Fruit Growers, 135 Wash. 156, 161, 237 Pac. 498, the court, after citing and quoting from Brown v. Chase, said: "In other words, the riparian owner, before he has any rights to protest, must, with reasonable certainty, show that, either at present or within the near future, he

will make use of the water for irrigation purposes." [9] The Washington Supreme Court has defined "reasonable time" to mean "say two or three years." State ex rel. Liberty Lake Irr. Co. v. Superior Court ,47 Wash. 310, 314, 91 Pac. 968.

It would appear that until the master evolved his erroneous theory the defendants were not in doubt that this court had previously ruled that they must prove their rights as of 1908 and establish their needs to the water

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[9] As recently as 1956, Brown v. Chase was approved in Snively v. Jaber, 48 Wash. 2d 815, 820, 296 P. 2d 1015, 57 A.L.R. 2d 560, quoting from Proctor v. Sim, 134 Wash. 606, 236 Pac. 114, where the court was urged to abandon the doctrine of Brown v. Chase and it expressly declined to do so. This court in California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F. 2d 555, 564, aff'd 295 U.S. 142, had occasion to call attention to Brown v. Chase and state its rule that a riparian owner in Washington was not entitled to the undiminished flow of a stream, "if that flow was not of substantial benefit to him."

Two authorities writing in the Washington Law Review suggest that the Washington rule is that a riparian's water righs may be lost or destroyed by non-user. See Horowitz, "Riparian and Appropriation Rights to the Use of Water in Washington," 7 Wash. L. Rev. 197, 212: It has been said that Brown v. Chase made it " . . . possible to argue that whereas the appropriator gained his right to the use of water by diligently and beneficially using the same, the riparian owner retained his right to the use of water by diligently and beneficially using the same." See also Morris, "Washington Water Rights—A Sketch," 31 Wash. L. Rev. 243, 249: "In this state however, non-user directly and prospectively, does work a forfeiture of the riparian right to use water for irrigation purposes." The author cites State v. American Fruit Growers, 135 Wash. 156, 237 Pac. 498, in support of this statement.

We are presented with no problem of forfeiture by non-user in this case. The authorities mentioned are cited for their demonstration that a riparian right is dependent upon beneficial use.

as of that time. Thus, in their petition for certiorari following our former decision, defendants stated: "We thus find the court upholding the agreement on the one hand and then requiring the water users on the north side to completely readjudicate their rights by requiring them to establish their needs as measured fifty years ago. . . . The Court of Appeals' decision states: 'Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims or right to the use of the waters of the stream.' The effect is to require the Ahtanum water users to adjudicate again their right to the use of waters from the stream. They are not only required to establish their needs as of 1908, which was one of the purposes of the 1908 agreement, but are again required to prove their water rights with the same particularity which was required of them in the state court proceeding in 1925."

Plainly with this correct understanding of the meaning of our mandate, the defendants at the trial on the remand proceeded to prove, elaborately and with particularity, what their water rights, or the water rights of their predecessors, were in 1908. In general, the proof that was received followed the allegations of separate answers filed. Testimony was given as to the number of acres or areas irrigated in or about 1908 on each parcel of ground. Those who testified in this respect, a substantial number of witnesses, were in their 60's, 70's or

80's. A reading of the cold record seems to indicate that they had reasonably clear recollections of what was going on in the Ahtanum Valley 50 years prior to the time they were testifying. Although, as we have indicated, the master's view of the case was such that he deemed it unnecessary to make findings as to the water rights of the then owners of these particular tracts, he did accept, practically in toto, the testimony of these witnesses as to the number of acres then irrigated on these several parcels. We have noted a few and rather unimportant respects in which the master made mistakes as to the area irrigated, to which we shall refer later in this opinion; notwithstanding these we necessarily accept in general his findings as to the acreage irrigated, findings which were approved by the trial judge.

The master's determination of the acres irrigated appears to be quite generous. This may have been due to the fact that the view which he took of the case was such that actual beneficial use of water by certain individuals in 1908 was not important. [10]

The testimony revealed without conflict a very defi-

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[10] The testimony and other evidence discloses that substantial portions of the lands found irrigated and irrigable were alkali flats sustaining only salt grass. (And see particularly a 1907 map, Exhibit 87.) Witnesses insisted these areas were irrigable and the master accepted their assertions, improbable as they seem.

nite picture of the farming and irrigation practices in Ahtanum Valley and in the areas here involved in 1908. At that time the area was much more sparsely settled; —as one witness put it at the time of the trial, there were ten times the people then resident there in 1908. The agricultural industry in 1908 was built upon and tied to the raising of livestock. The nearby forest reserves and other available ranges in the adjoining mountains provided pasture for the ranchers' cattle; after the cattle were brought out of the hills in October, they were fed through the winter with the hay harvested early in the summer on these lands and with grain, mainly barley, grown there also. In the early months of May and June, when the heavy run-off was appearing in the Ahtanum, the lands were irrigated and the hay and grain crops made. The hay and grain were cut and harvested by the first of, or early in, July. The hay in the main was wild hay or timothy, although in 1908 some alfalfa had been seeded in a few places.

Because of this type of farming the system of irrigation which developed on the lands outside of the Indian Reservation in the Ahtanum Valley adequately met and fulfilled these needs. This method of farming was largely the result of the fact that by the first of July each year, generally speaking, the supply of water had greatly diminished so that because of the porous condition of the bed of Ahtanum Creek, the water flowing

therein sank out of sight. Thus one witness for the defendants who had testified with respect to a number of parcels of land there, one of which he owned in 1908, testified as follows: "Early in the year, I irrigated, but later in the year I did not because you had no water." Describing the land he said: "A. You could raise good crops on it if you had the water. Q. But you did not have water? A. After July. Q. After July what, first? A. The first part of July." [11]

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[11] The witness also testified: "Q. (By Mr. Veeder) Now, your uses, then of water and in that area generally, your uses and your neighbors' uses, were geared to the available supply of water ending about July 1st, is that right? A. Yes. Q. In other words, your whole economy was based upon a shortage of water after July 1st? A. Yes. Q. So you had no late water at all down there, that is, late in the irrigation season? A. As far as irrigating is concerned, we didn't no."

Another principal witness for the defendant, one who testified at length with respect to many of the defendants' lands, explained that in 1908 the whole economy in the area was such that the people raised mostly livestock and dairy cows; the livestock was pastured in the summer on the forest reserve, the ranchers cut timothy and wild hay for winter feed, and after they cut the hay they stacked it and held it for winter feeding. The cattle were brought in about October. He said that basically and fundamentally "their whole economy was geared to an early irrigation season use of water." "The whole farming and ranching operation was based on an early spring, a high run-off, and a lot of wild hay and timothy." The crops raised were "hay and grain, mostly hay." The witness testified that after July 15, he was out of water because it would sink above my ditch." This witness testified that the practice in the area was to harvest the grain around the first to the 15th of July "along about the 10th, 15th, something like that;" that the landowners would "have to quit irrigating some ten days before they harvested because they could not harvest from a wet field,"—"the binder would get stuck".

Another principal witness, who described the irrigation on numerous tracts, and who herself had been an owner in

In those days there were no irrigation diversion works or other structures. When the ranchers wanted water they simply carried it away from the creek. The stream banks "were cut whenever they seen fit." They would flood the water across the natural pasture and the grass would grow and then when the fields dried out after the first of July, the hay was cut. That was the backbone of the livestock industry. Some small amount of alfalfa had been introduced in the area by 1908. The witness was able to list only one tract of 40 acres of alfalfa that she knew of in 1908. There is no showing that the ranchers procured more than one cutting of alfalfa. [12]

We have here listed a fair sample of all the testimony given as to the conditions of farming and irrigation in 1908. If the first of the alfalfa was cut about the first

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1908, testified as to certain tracts which raised hay, grain, and had pasture for range cattle. She testified that as to the area generally, it was "a livestock industry depending upon this wild hay until we started with alfalfa;" that the hay was raised mainly for feeding of stock. As to the great increase of population in the area since 1908 she said, "We got ten to one now." Testifying specifically with respect to one piece of property, she said: "The water goes down in the summer so that there is no water in the later part of the summer; that is from the first of July; but in the spring they irrigate the entire place." With respect to her own property she said: "as a rule we haven't got no water down in that district too much after the first of July."

[12] One such witness testified that if the first crop of alfalfa could be cut by the 20th of June it would be possible to irrigate the land sufficient to cut a second crop.

of July in those places where alfalfa was found, there is no evidence that a second crop could be irrigated or produced with the available water. [13]

An examination of the testimony of the witnesses on whom the defendants relied for proof of their use, or of their predecessor's use, of water for irrigation in 1908, discloses a complete unanimity as to the fact that water for irrigation was generally not available after the first

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[13] There is some evidence that there were hops grown in the valley in some small tracts, but there is no evidence that late water was available for irrigation of hops. There is testimony by those who raised hops that water for them was procured from other sources. One witness who testified that the available water for his irrigation was the same at the present time as it was in 1908, said that his water was shut off around July 1st, and that "when they shut us off we pumped." The witness raised hops; he also had a spring and a swamp which he drained and which was not Ahtanum water.

Another witness who raised hops had springs on his property from which he irrigated. "When the creek got low we would take water from where we could get it. Then the springs and any place else." A perusal of this witness's testimony, direct and cross, is interesting because of his obvious effort to make it clear that water was often not available. Asked what work he did in the Ahtanum Valley he replied: "Irrigated, tried to, when we had water." Asked what crops were grown he listed among those crops timothy hay, where they could get, you know, where there was enough water." Asked whether certain property had been irrigated continuously from 1907-8 to the present time, he answered, "Yes, when there was water." He said "sometimes there wasn't any water in the creek," and that then he would take water from the springs.

Another witness who formerly raised hops in his land testified that he stopped that practice for several reasons. One was the low price, and another reason was, "We used to buy water from the fellows who had the wells and it got too expensive for them to buy water for the hops so they pulled them out."

of July each year; that the methods of farming then used had been adapted to that circumstance through the raising of crops which would mature or could be made through irrigation up to the first of July and that in general their type of farming was such that they did not require or need irrigation after the first of July.

This evidence and the record made with respect to the water rights of the defendants and the use of water by defendants in 1908 compels a conclusion that their water rights were limited in time. Applicable here is the rule universally recognized as a part of the law of waters in the western states that a water right may be measured by time as well as by volume. This principle is well stated in Hardy v. Beaver County Irrigation Company, 65 Utah 28, 40, 234 Pac. 524, as follows: "It is elementary that an appropriation of water is limited by time as well as by amount; in other words, that an appropriator's right is limited by the quantity of water which he has beneficially used and the seasonal period during which he has used the same. [Citations omitted.] And in the case at bar the respondents' appropriations must be limited to the amount of water they can use beneficially during the period of the year when they have actually been accustomed to use the same." (The court in that case, dealing with respondents' rights to the use of the waters of a stream, noted that "the record

shows conclusively that they did not use any water after subsidence of the flood flow in June. . . . ")

Another case which involved facts and circumstances strikingly similar to those present here is McPhee v. Kelsey, 44 Ore. 193, 198, 74 Pac. 401. The court there said: "Defendant's original appropriation therefrom and that from Hutchinson Slough were for domestic, stock, and irrigating purposes; that is, for the irrigation of timothy and wild grasses used for making hay, and crops of cereals, such as wheat, oats, barley, and the like. Water was required for such irrigation as late as the early part of July, after which time no use was made of it except such as was needed by the parties concerned for domestic and stock purposes, which was inconsiderable as compared with the whole. Such is, therefore, the measure of the original appropriation. . . ." [14]

Other cases recognizing and applying the same principle, to the effect that a right to use water does not

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[14] The case before us does not involve any problem of use of water for domestic or stock purposes. There is no evidence of use or need for stock or domestic water in 1908. It is noted that the 1908 agreement recites that it is made for the purpose of settling the rights of the parties to make diversions for irrigation purposes. "That whereas the parties hereto claim certain quantities of water in the Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes. . . . "

extend beyond the period in which it has been beneficially used, are numerous. [15]

The principle here referred to has been noted by the text writers on water law as applied in the western states. Thus, Mr. Kinney, (2 Kinney, Irrigation and Water Rights §786 (2d ed. 1912) ), using the language found in Smith v. O'Hara, 43 Cal. 371, 376, said: " . . . there is no difference in principle between appropriations measured by time and those measured by volume." [16]

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[15] Clough v. Wing, 2 Ariz. 371, 378, 17 Pac. 453, 455 (1888), quoting from Barnes v. Sabron, 10 Nev. 217, the court said: " 'In other words, if plaintiff only appropriated the water during certain days of the week, or during a certain number of days in a month, then defendants would be entitled to its use in the other days of the week or the other days in the month.' "

Santa Paula Waterworks v. Peralta, 113 Cal. 38, 44, 45 Pac. 168, 170 (1896). The trial court awarded the defendant "use of the water for irrigation to twenty-four hours of each week commencing on the afternoon of Saturday;" held on appeal, [H]e having ceased to use the water at other times, the plaintiffs might lawfully take it at those times."

Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. 331 (1898): " . . . [T]here is no difference in principle between an appropriation measured by quantity and an appropriation measured by time.' Kin. Irr. §177 et seq. . . . " 53 Pac. at 333.

Uhrig v. Ciffin, 72 Idaho 271, 240 P. 2d 480, 482 (1952). ". . . '[T]here is no difference in principle between "an appropriation measure by quantity and an appropriation measured by time." ' "

Galiger v. McNulty, 80 Mont. 339, 354, 260 Pac. 401, 404 (1927): " 'There is no difference in principle between appropriations of waters measured by time and those measured by volume.' . . . ."

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[16] The same statement is often found in the decisions.

It seems fair to say that the nature and extent of the water rights of the contracting white landowners as of 1908 must have been within the contemplation of the parties when the 1908 agreement was executed. Those white landowners, as the record shows, were using waters of Ahtanum Creek for the production of their crops, principally wild hay and timothy, and for their grain, principally barley, which were to be used for feed for their livestock. This was the limit of the then needs of these contracting parties.

At that time, as the evidence shows, there was a complete absence of diversion works, measuring de-

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See cases cited in note 16, supra.

See Hutchins, "Selected Problems in the Law of Water Rights in the West", pp. 299-300 (1942): "The appropriative right commonly relates to a period during which water may be diverted for use. One may be entitled to divert a given quantity continuously throughout the year, or only at intervals. * * * * The principle is logical, for one perfects an appropriative right only to the extent of actual application of water to beneficial use; the flow during other seasons or periods, in which there was no attempt or intent to divert the available flow, has not been applied to beneficial use by this particular appropriator and there is unappropriated water so far as he is concerned."

See also, Long, Irrigation §137 (2d ed. 1916): "As we have already seen, a prior appropriator of water acquires an absolute right thereto only to the extent to which such water is applied to beneficial use. His right to the water depends upon user, and can exist or continue only at or during such times as the water is used or needed for a beneficial purpose. If, therefore, the prior appropriator makes use of the water only at certain times as during certain seasons, or on certain days in the week, or during a certain number of days in a month, other persons may acquire a right to the use of the water at other times, or on other days."

vices or other controls for use of the water. When the farmer wanted water they merely opened up a ditch with a plow or turned the water into high water channels and proceeded to flood their lands. Once the crops had been made and were ready for cutting early in July, their needs had terminated. As we said in our earlier decision, "their interest as of 1908, were necessarily limited to their needs, and subsequent uses and ownerships could not enlarge their rights under the arrangement for the division of these waters."

The master and the court, upon the basis of the evidence before them, have found that the duty of water appropriately applied here is one-half inch to the acre, or one second foot for each one hundred acres. The master ascertained and found the tracts of land actually irrigated and the irrigated acreage of such tracts; and we accept those findings (except for certain apparent errors hereafter mentioned). The only matter remaining therefore for determination here is the extent of the period during which the needs of those owners as of 1908 continued and the period during which they actually used water for irrigation. Applicable here is the rule stated in Hardy v. Beaver County Irr. Co., supra, (234 Pac. at 528) that "it is equally incumbent on claimants in actions of this kind to prove the extent of their appropriation both in time and amount with the same degree of certainty."

In the light of the unanimity of the evidence upon the subject, we are compelled to hold that the water rights of the individual parties to the 1908 agreement, which were contemplated thereby, terminated in the early part of July in each year, a conclusion which must be reflected in the final judgment in this case.[17] This unanimity of the evidence greatly simplifies the solution of this case. If it appeared that on one parcel water was needed and actually used for a materially larger period than on another, the court would necessarily have to make separate findings as to each individual parcel affected. As we note hereafter, the trial court chose to deal with the division of the water as to the defendants "in the aggregate." Such would not be feasible were it

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[17] The termination of that period is described by the various witnesses in substantially the same language. One witness said: "From the 1st of July", and also describing the available water, said there was not "too much after the first of July." Others used such expression as "around the first of July," and "along about the first of July." It is to be noted that the significant testimony in this case, to which we have referred, relates to the use of and availability of water in the year 1908. We know that in 1908 the principal diversion canal on the Indian lands on the opposite side of the Creek had not been constructed. Extensive use of the water for the Indian land did not commence until that ditch was completed some time between the years 1911-1915. There is no evidence in the record as to how much water was being used for the Indian land for 1908. Since uses there were not extensive at that time, it may well be that the supply of water flowing out of Ahtanum Creek, out of which the defendants were making their diversions, at that time included at least some part of the Indians' 25 per cent of those waters.

not plain that the periods of use by all defendants were substantially the same.

The appellant has specified error as follows: "In failing to determine the actual beneficial use made of the waters by individual defendants in 1908 or at the present time." This specification relates to the court's third conclusion of law as follows: "That this water rights adjudication under the issues as presented herein is restricted to a determination of plaintiff's rights to the waters of Ahtanum Creek, as originally reserved under the Treaty of 1855, so far as they were retained by the agreement of 1908, and a determination of defendants' rights, collectively, so far as they were fixed under said agreement. That these rights, under the terms of said agreement, are to be ascertained by measurement and by a percentage division in the aggregate, of Ahtanum Creek waters as provided therein without an adjudication of waters to or for any particular tract of land." It is argued that that conclusion is not in accord with the directions contained in our original opinion.

There, in noting the insufficiency of the answer originally filed by the irrigation district, we said that the answer "is wholly uninformative as to who these water users are, what lands they claim to have the right to irrigate, or how they deraign their titles to any water rights." 236 F. 2d at 339. We also said (Ibid.): "Since the cause must be remanded for further proceedings in the trial

court, and since those proceedings must determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles, it is apparent that proper and appropriate answers must be required from all defendants and each of them to set out and show what their water rights were, the lands they claimed the right to irrigate, and how they deraigned their titles.

Appellant particularly complains of the district court's adjudication of the rights of the defendants "in gross" or "in the aggregate", as stated in the Conclusion No. 3 previously quoted; and asserts that this treatment of the rights of the defendants as a group, or in the aggregate, is error for several reasons. In the first place it asserts that this treatment is in violation of the directions made by this court in the portion of the opinion above quoted. Also alluded to is our statement that "their needs as of 1908 were necessarily limited to their then needs, and subsequent uses or ownerships could not enlarge under the arrangement for the division of these waters." We had also said that "It must be understood that the right to the use of 75 per cent of the waters must have been limited to the needs as of 1908 of particular individuals who were parties to the agreement." Appellant asserts that these directions cannot be implemented unless the court adjudicates the water rights of each individual defendant separately and individually.

Appellant argues that, if the in gross treatment is permitted, then if the needs of a particular tract of land lessened, or the use of the water there is abandoned, some other white owner would be able to enlarge his use. Hereafter, in this opinion, we take into account the findings of the district court which disclose that as to some of the parcels of land owned by defendants, the use of water thereon diminished after 1908 so that the irrigated acreage in 1957 was less than that found to have existed in 1908. We then shall take appropriate action with respect to that circumstance. We recognize that the same diminution of use may take place hereafter, and that in some instances there may in fact be an abandonment of some water rights. The record shows that since 1908 some of these lands have been used for town sites, for polo grounds, and airports, uses which would eliminate any need for further irrigation;—that process may continue hereafter.

But, as we shall note shortly, the court, in deciding upon this in gross treatment, had other considerations in mind, which prompted this exercise of its discretion. The whole problem is not a simple one. Clearly in some cases, a user who decides to give up farming on his land may, under Washington law, sell his water right to another. The consequences of a diminished use, or an abandonment, mentioned by appellant, must be weighed against the court's assigned reasons for not undertaking

a tract by tract adjudication. We think the adverse effects suggested by appellant can be guarded against if the court reserves jurisdiction, as it may properly do, to modify its decree at a later time, should changed conditions so require.

We recognize that it would have been entirely in accord with the directions indicated in our former opinion for the court in its decree here to adjudicate the water rights of particular tracts separately and individually. However, there are other considerations which we think warrant the district court in exercising its discretion not to extend its decree so far. After all, the primary purpose of the plaintiff's suit was to procure an adjudication which would protect the rights of the Indians and of the Government, as trustee for them, as against claims of the defendants. The Government cannot be interested in a general adjudication as to the relative rights, among themselves, of the various defendants. It would not be interested in their respective priorities. As stated in Virginian Ry. v. Federation, 300 U.S. 515, 551: " . . . the extent to which equity would go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court."

One matter properly to be considered in the exercise of this discretion is the fact that the State of Washington had established through its Water Code, adopted

in 1917, an elaborate system for adjudicating, controlling, and administering generally, water rights acquired under state law. Rev. Code of Wash., Ch. 90.03. This Water Code sets up a system for the establishment of water masters operating under a supervisor of water resources who keep track of rights and priorities, open and close headgates, and divide and regulate the use of water. A federal district court is not necessarily possessed of any better machinery; and we think it was within the discretion of the court below to limit the scope of its decree so as to avoid its having to assume distribution and control functions which it is in no position to exercise. As we have noted, the district court has the power to reserve the right hereafter to make any appropriate order or modification of its decree required to meet such changing conditions as may hereafter develop touching and affecting the appropriate protection of the rights of the appellant. [18]

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[18] Authorities illustrative of the proposition that a court of equity may fashion its decree so as to avoid undue continuous administration and supervision of the carrying out of the decree are Marble Company v. Ripley, 77 U.S. (10 Wall.) 339, 358-9; Arizona Edison Co. v. Southern Sierras Power Co., 9 cir., 17 F.2d 739, 740; see also Restatement, Contracts §371. This discretionary limitation of its action by a court of equity in some ways resembles the traditional "exercise of the sound discretion" of a court of equity in cases of abstention, especially where there is involved a state's "well organized system of regulation." Burford v. Sun Oil Co., 319 U.S. 315, 327. An illustration of a decree retaining jurisdiction for future action is found in United States v. Parke, Davis & Co., 365 U.S. 125.

Notwithstanding the generalizations contained in Conclusion No. 3, quoted above, the findings do set out in detail the names of the various parties defendant, referring to the numbered answers filed with a description of lands on which the right to use water is claimed, and a statement of the number of acres irrigated in 1908 on each parcel described. In the light of those findings we perceive no difficulty in drawing the proper conclusion that as of 1908 the owners of those particular parcels thus descried in the findings were making use of the waters of Ahtanum Creek to irrigate the irrigable area there found, and that accordingly the several owners of those tracts had the rights, as of 1908, to water for irrigation for the areas there determined.

Appellant complains that the court refused to adjudicate the 1908 claims of some 456 defendants who failed to establish beneficial use of water or the existence of water rights belonging to them or to their predecessors in interest as of that date. However, the findings of the court do disclose, as we have indicated, the lands which were in fact irrigated in 1908, and the acreage in each parcel that was so irrigated. Obviously this finding purports to be and is a determination as to the entire use of waters in 1908. By excluding therefrom other tracts, the finding, it seems to us, adequately disposes of any claims that might have been made by other persons in respect to lands not listed in the findings.

Appellant argues at considerable length that the trial court's findings with respect to the claimed waste of water are clearly erroneous and that the evidence calls for more specific findings of actual waste, both in 1908, and as of the time of the trial of the case in the court below.

At the trial before the master, the appellant undertook to show that the defendants' use of the waters of Ahtanum Creek involved great waste of those waters. It was shown that some of the defendants used meandering high water channels to carry water to their lands; that these channels were across porous gravelly soil, not puddled as a properly constructed irrigation ditch would have been, and that excessive loss of water occurred not only in diversion ditches but upon the lands themselves. The master found that there was no evidence of undue or unreasonable waste of water and his findings were adopted and approved by the trial judge.

In our former opinion we noted this claim of the United States, that it would be a matter appropriate for consideration and determination on retrial of the cause, and noted that if waste could not otherwise be prevented the court might restrain the party from using water until his rights were determined, citing Glaze v. Frost, 44 Ore. 29, 74 Pac. 336. See also Doherty v. Pratt, 34 Nev. 343, 124 Pac. 574.

When the master's findings on the question of waste

were challenged before the district court, it said in its opinion: "The evidence, as I have considered it in the record made before the master and as I have heard and observed it in the course of several proceedings before me, would, without doubt, have sustained a finding of waste by the master if we were concerned with the *usual water adjudication and* irrigation project or system. In my opinion the most impressive showing has been made with respect to the use of old, meandering natural channels for the conveyance of water and past failure to provide effective control and measuring devices. However, the latter practice has now been substantially corrected and the master in his report has set forth in a logical and persuasive manner reasons justifying the use of what would appear to be an antiquated and inefficient irrigation system. It is my conclusion that I should not disturb his findings and conclusions on this issue. It would be unjust and unreasonable to have required defendants to establish a modern and efficient irrigation program or system in view of the long standing efforts of the government to take from these users the waters it so improvidentially relinquished in 1908. Defendants' water rights have been and will continue to be in doubt until a decree in this litigation is entered and made final. Clearly, had all parties to its litigation approached the problem in a more cooperative and concilatory manner much earlier a less costly and more satisfactory solution

would have been found than can possibly develop from a court decree."

We cannot hold this determination of the trial judge to be clearly erroneous. We think that for another reason there is no practical necessity for any further findings at this time, on this point. The master has found, as we have noted, the appropriate duty of water to be one-half inch to the acre or one second foot per 100 acres, and we think that the self interest of the several water users will require them to make sure that they obtain the maximum benefit from the quantities of water permitted them by seeing to it that there is no waste. If this proves not to be true, and waste develops, the court, by retaining jurisdiction, will be able to correct that situation by appropriate orders.

We have noted that the master, in findings which were approved by the court, determined the number of acres on the various parcels of land, described in several answers, which were under irrigation in 1908. In general those findings cannot be said to be without support in the evidence. There are a few instances, however, in which we think that the record shows that a mistake has been made. These are listed in Appendix A attached to this opinion. The amounts of the corrected acreage are shown in column 3 of Appendix B.

Another circumstance requires further modification

of the total 1908 irrigated acreage found by the court. As we noted in our former opinion, "the right to the use of the 75 per cent of the waters must have been limited to the needs as of 1908 of the particular individuals who were parties to the agreement," and "when the needs of those parties, [i.e. these particular individuals] were such as to require less . . . then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater." The findings show that in the cases of a substantial number of these particular individuals, or their successors, their needs and uses of water decreased after 1908. We previously alluded to this, noting that the use of water on certain tracts diminished so that the irrigated acreage on these parcels in 1957 was less than that found to have existed in 1908. The result of these findings are disclosed in the final column of Appendix B. We must therefore modify the decree to reflect this diminution also. [19]

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[19] The manner in which the court arrived at the irrigated acreage in 1957 is outlined in Appendix I accompanying appellees' brief. Its determination is based on the testimony and exhibits furnished by the engineers, Jensen and Fiedler, and their exhibits. Their testimony was based upon measurements and field observations and outlined on aerial photographs and other exact maps of the area. These two witnesses, in giving the acreage irrigated as of 1957, made it plain that they were describing the condition then and in recent years, that is "within the last five to seven years." They examined the ground for evidence of irrigation "whether there were laterals leading from the head ditch, whether fields in the area had been corrugated," etc., in short, "whether I felt irrigation had taken place in the past on that field."

In consequence the rights of the defendants must be measured on a basis of 4696 acres.

The conclusions which we have reached here are such that a new trial of the case is unnecessary. A retrial would be most unfortunate. The parties should be informed now as to where they stand, and the unanimity of the evidence, to which we have previously alluded, makes our conclusion as to the extent of the 1908 water rights possible on this record. Thus the Indian Tribe may now ascertain, by actual experience under the decree, just how badly they have suffered through the Code taking of their property. Plainly the waters they are here awarded will be insufficient for the irrigable lands of the Reservation. [20] Just how insufficient they can soon tell.

The judgment of the court below must be modified to reflect our holding here. Accordingly the cause is remanded with directions to modify the portion of the decree dividing the waters to read as follows: [21]

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[20] See the reference to their possible claim in footnote 25 in our former opinion, 236 F. 2d at p. 339.

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[21] The corresponding portion of the decree as entered by the district court reads as follows:

"IT IS ORDERED, ADJUDGED and DECREED that the waters of Ahtanum Creek shall be and they are hereby divided between the parties to this action as follows:

a. To defendants, for use on their lands north of Ahtanum Creek, seventy-five percent of the natural flow of Ahtanum Creek, as measured at the north and south

IT IS ORDERED, ADJUDGED and DECREED that the waters of Ahtanum Creek shall be and are

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fork guaging stations, provided that when the said measured flow exceeds 76.3 cubic feet per second, defendants shall have no rights to the excess, except in subordination to the higher rignts of the plaintiff.

b. To plaintiff, for use on Indian Reservation lands south of Ahtanum Creek, twenty-five percent of the natural flow of Ahtanum Creek, as measured at the north and south fork gauging stations; provided that when the natural flow as so measured exceeds 76.3 cubic feet per second, all the excess over that figure is awarded to plaintiff, to the extent that the said water can be put to a beneficial use.

c. Plaintiff may divert such water from the south fork of Ahtanum Creek as can be beneficially used for the individual diversions into the Yakima Indian Reservation lying above the main Bureau of Indian Affairs diversion; provided, however, that the water diverted to such individual diversions shall be charged against and deducted from the over-all award set forth in (b) above.

d. To the plaintiff, for the lower Bureau of Indian Affairs diversion, a daily diversion of water representing five percent of the natural flow of Ahtanum Creek as measured at the north and south fork gauging stations. This award shall represent plaintiff's interest in the return flow of the main stem of Ahtanum Creek, and the award to defendants shall be conditioned upon plaintiff receiving this flow of water at the lower Bureau of Indian Affairs diversion.

e. To defendants, all the rest of the return flow in the main stem of Ahtanum Creek, and all the return flow in Hatton and Batchelor Creeks.

f. Any water loss which may occur between the north and south fork gauging stations, and the defendants Hatton Creek diversion, is to be absorbed by defendants, plaintiff being entitled to its full stated percentage of the measured flow, and defendants taking the balance."

The allowable diversion for the north side users of one second-foot per 100 acres based on 5718 acres, or 57.18 second-feet, does not appear in the decree in that form. The court in its conclusion stated this quantity as 57.2 cubic feet per second. The approximate figure of 76.3 was arrived at by adding one-third of 57.2 to that amount.

hereby divided between the parties to this action in the following manner and at the following times, to-wit:

I

From the beginning of each irrigation season in the spring of each year, to and including the tenth day of July of each such year, said waters shall be divided as follows:

a. To defendants, for use on their lands north of Ahtanum Creek, seventy-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations, provided that the total diversion for this purpose shall not exceed 46.96 cubic feet per second, and provided that when the said measured flow exceed 62.59 cubic feet per second defendants shall have no right to the excess, except in subordination to the higher rights of the plaintiff.

b. To plaintiff, for use on Indian Reservation lands south of Ahtanum Creek, twenty-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations; provided that when that natural flow as so measured exceeds 62.59 cubic feet per second, all the excess over that figure is awarded to plaintiff, to the extent that the said water can be put to a beneficial use.

c. Plaintiff may divert such water from the south fork of Ahtanum Creek as can be beneficially used for the individual diversion into the Yakima Indian Reservation lying above the main Bureau of Indian Affairs diversion; provided, however, that the water diverted to such individual diversion shall be charged against and deducted from the over-all award set forth in "b" above.

d. To the plaintiff, for the low Bureau of In-

dian Affairs diversion, a daily diversion of water representing five per cent of the natural flow of Ahtanum Creek as measured at the north and south fork gauging stations. This award shall represent plaintiff's interest in the return flow of the main stem of Ahtanum Creek, and the award to defendants shall be conditioned upon plaintiff receiving this flow of water at the lower Bureau of Indian Affairs diversion.

e. To defendants, all the rest of the return flow in the main stem of Ahtanum Creek, and all the return flow in Hatton and Batchelor Creeks.

f. Any water loss which may occur between the north and south fork gauging stations, and the defendants' Hatton Creek diversion, is to be absorbed by defendants; plaintiff being entitled to its full stated percentage of the measured flow, and defendants taking the balance.

II

After the tenth day of July in each year, all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of Ahtanum Creek, to the extent that the said water can be put to a beneficial use.

The judgment is ordered modified further by adding thereto the following:

The court reserves jurisdiction to make such further orders as may be necessary to preserve and protect the rights herein declared and established, should a subsequent change in the situation or condition of the parties hereto so require.

REMANDED WITH DIRECTIONS

APPENDIX A

ERRORS IN FINDINGS AS TO THE 1908 ACREAGES

| Answer Number | Resulting Reduction in Acres | Explanation |
|---|---|---|
| 4 | 19 | In the findings, 19 acres of the 70 should have been attributed to Answer No. 73, and is a duplication. |
| 12 | 31 | No evidence supports any finding on the 1908 use. It is not clear from the witness's direct testimony that the 31 acres mentioned was the 1908 irrigated acreage. On cross-examination, the witness said, "That is all in pasture and that was in pasture at that time and brush." |
| 27 | 20 | Twenty acres found to have been irrigated in 1908 were in fact not owned by a 1908 signatory. |
| 53 | 8 | The witness said that in 1908 one-half of each of the two "40s" was irrigated, but the answer pleaded that one parcel was 40 acres and one was 24 acres. Thus, the evidence was that 32, not 40, acres were irrigated in 1908. |
| 69 | 3 | Apparently a clerical error rendered 25 acres as "28", see footnote 38 to Appendix I of "Appendix of Appellees." |
| 79 | 5 | On cross-examination the witness changed his testimony to 30 from 35 acres. |

## APPENDIX A (Cont'd)

| Answer Number | Resulting Reduction in Acres | Explanation |
|---|---|---|
| 124 | 33 | The 33 acres were sub-irrigated. (An appropriation from a stream requires diversion therefrom. Cf. Laws of Washington 1891 Ch. CXLII §3). |
| 128 | 6 | Out of a total of 5.5 acres, 5 acres were sub-irrigated, not 6.5. |
| 134 | 1 | The witness who said 5 acres were irrigated in 1908 also testified that one of the five acres is presently part of an airport. |
| | | Answers 160, 163, 187, 188, 189, and 234, represent land formerly owned by one Cope in an 80 acre tract. Witness Croxford testified that 60 acres of Cope's 80 acres were irrigated in 1908. Thus, three-fourths of the present acreage of each of these answers is the amount properly allocable to each of the 1908 irrigated acreage. The revised allocations are as follows: |
| 160 | +.71 | 10.71 acres |
| 163 | .43 | 7.57 " |
| 187 | +.16 | 4.16 " |
| 188 | +.64 | 30.64 " |
| 189 | .53 | 4.47 " |

## APPENDIX A (Cont'd)

| Answer Number | Resulting Reduction in Acres | Explanation |
|---|---|---|
| 234 | | (No finding was made as to Ans. 234; therefore the amount of 3 acres allocable to this answer is excluded.) |
| 170 | 3.08 | The answer pleaded that the parcel measured 34.92 acres. Witness Scoul-ler said that 3 acres were not irri-gated; thus the correct finding would be 31.92. |
| 179 | 35 | It appears from the answer itself that the land was not owned by a 1908 signatory. |
| 215 | 55 | The answer itself indicates that the land was not owned by a 1908 signa-tory. |
| 220 | 7.75 | According to the answer, parcels 3 and 4 measured 31.75 acres. Witness Croxford excluded from these parcels 4.5 acres as not irrigated in 1908; the net was therefore 27.25 acres. |
| 221 | 9 | The court found 64.1 acres irrigated in 1957. This must be in error as the answer shows only 62.88 acres in toto, not one of which was likely to be irrigated. The owner testified he irrigated 55 acres in 1957; the wit-ness as to 1908 irrigation testified it was 6 acres less than in 1957; the 1908 total: 49 acres. |

## APPENDIX B

| | | | | |
|---|---|---|---|---|
| 1 | 80 | | 151.7 | 80 |
| 2 | 90 | | 101.3 | 90 |
| 3 | 80 | | 72.2 | 72.2 |
| 4 | 70 | 51 | 47.1 | 47.1 |
| 5 | 67 | | 63.7 | 63.7 |
| 6 | 30 | | 37.6 | 30 |
| 7 | 12 | | 16.8 | 12 |
| 8 | 45 | | 53.9 | 45 |
| 10 | 41 | | 41.8 | 41 |
| 11 | 10 | | 17.8 | 10 |
| 12 | 31 | 0 | 37.4 | 0 |
| 13 | 45 | | 58.3 | 45 |
| 14 | 20 | | 15.3 | 15.3 |
| 15 | 20 | | 24.7 | 20 |
| 16 | 99 | | 99 | 99 |
| 17 | 18.8 | | 29.8 | 18.8 |
| 18 | 23.5 | | 23.5 | 23.5 |
| 19 | 18.5 | | 19.3 | 18.5 |
| 20 | 10 | | 2.0 | 2.0 |
| 21 | 8.3 | | 19.3 | 8.3 |
| 22 | 70 | | 48.1 | 48.1 |
| 23 | 25 | | 9.0 | 9.0 |
| 26 | 80 | | 32.7 | 32.7 |
| 27 | 55 | 35 | 24.92* | 24.92 |
| 28 | 10 | | 15.3 | 10 |
| 29 | 30 | | 43.9 | 30 |
| 31 | 50 | | 28.4 | 28.4 |
| 32 | 20 | | 22.9 | 20 |
| 33 | 15 | | 15.4 | 15 |
| 34 | 20 | | 20.3 | 20 |
| 35 | 3 | | 2.5 | 2.50 |
| 36 | 40 | | 57.5 | 40 |

*See Appendix A, Ans. No. 27.

APPENDIX B (Cont'd)

| | | | | |
|---|---|---|---|---|
| 37 | 57 | | 66.0 | 57 |
| 38 | 75 | | 204.1 | 75 |
| 39 | 45 | | 31.7 | 31.7 |
| 40 | 18 | | 10.5 | 10.5 |
| 41 | 92 | | 90.2 | 90.2 |
| 42 | 33 | | 33.8 | 33 |
| 43 | 73 | | 68.1 | 68.1 |
| 44 | 40 | | 45.9 | 40 |
| 45 | 70 | | 72.4 | 70 |
| 46 | 60 | | 110.6 | 60 |
| 47 | 100 | | 101.1 | 100 |
| 49 | 5 | | 17.9 | 5 |
| 50 | 70 | | 56.5 | 56.5 |
| 51 | 24 | | 32.3 | 24 |
| 52 | 20 | | 56.0 | 20 |
| 53 | 40 | 32 | 44.6 | 32 |
| 60 | 65 | | 68.9 | 65 |
| 63 | 2 | | 3.8 | 2 |
| 64 | 35 | | 70.4 | 35 |
| 65 | 13 | | 7.5 | 7.5 |
| 66 | 47 | | 57.8 | 47 |
| 68 | 8 | | 8.8 | 8 |
| 69 | 28 | 25 | 31.6 | 25 |
| 70 | 32 | | 30.5 | 30.5 |
| 72 | 60 | | 49.6 | 49.6 |
| 73 | 19 | | 18.9 | 18.9 |
| 74 | 19 | | 13.6 | 13.6 |
| 75 | 18 | | 18.5 | 18 |
| 76 | 75 | | 71.0 | 71.0 |
| 77 | 164 | | 169.4 | 164 |
| 78 | 150 | | 140.6 | 140.6 |
| 79 | 35 | 30 | 32.0 | 30 |
| 80 | 38 | | 8.4 | 8.4 |

## APPENDIX B (Cont'd)

| Answer Number | Findings on 1908 Irrigated Acreage | Corrected 1908 Acreage See Appendix B | Findings on 1957 Irrigated Acreage | Lesser of 1908 or 1957 Findings as Corrected |
|---|---|---|---|---|
| 90 | 60 | | 14.3 | 14.3 |
| 96 | 70 | | 57.0 | 57.0 |
| 98 | 70 | | 81.4 | 70 |
| 106 | 39 | | 34.8 | 34.8 |
| 107 | 75 | | 48.7 | 48.7 |
| 108 | 39 | | 33.4 | 33.4 |
| 112 | 39 | | 35.9 | 35.9 |
| 122 | 20 | | 30.4 | 20 |
| 124 | 34.5 | 1.5 | 35.7 | 1.5 |
| 125 | 20 | | 13.4 | 13.4 |
| 126 | 20 | | 21.1 | 20 |
| 127 | 15 | | 25.1 | 15 |
| 128 | 6.5 | .5 | 33.3 | 00.5 |
| 129 | 10 | | 18.5 | 10 |
| 130 | 8 | | 13.7 | 8 |
| 131 | 4 | | 2.6 | 2.6 |
| 132 | 50 | | 88.0 | 50 |
| 133 | 16 | | 28.0 | 16 |
| 134 | 5 | 4 | 12.9 | 4 |
| 135 | 16 | | 10.6 | 10.6 |
| 136 | 50 | | 74.7 | 50 |
| 137 | 20 | | 44.5 | 20 |
| 138 | 30 | | 25.4 | 25.4 |
| 140 | 35 | | 21.4 | 21.4 |
| 142 | 25 | | 38.0 | 25.0 |
| 143 | 40 | | 34.7 | 34.7 |
| 145 | 20 | | 76.9 | 20 |
| 151 | 150 | | 119.7 | 119.7 |
| 160 | 10 | 10.71 | 11.4 | 10.71 |
| 163 | 8 | 7.57 | 9.8 | 7.57 |
| 164 | 70 | | 75.8 | 70 |
| 165 | 10 | | 8.7 | 8.7 |
| 166 | 5 | | 3.5 | 3.5 |
| 167 | 10 | | 13.7 | 10 |
| 168 | 7 | | 16.0 | 7 |

## APPENDIX B (Cont'd)

| Answer Number | Findings on 1908 Irrigated Acreage | Corrected 1908 Acreage See Appendix B | Findings on 1957 Irrigated Acreage | Lesser of 1908 or 1957 Findings as Corrected |
|---|---|---|---|---|
| 170 | 35 | 31.92 | 10.5 | 10.5 |
| 172 | 10 | | 18.0 | 10 |
| 176 | 30 | | 5.7 | 5.7 |
| 178 | 50 | | 30.7 | 30.7 |
| 179 | 35 | 0 | 31.6 | 0 |
| 187 | 4 | 4.16 | 5.0 | 4.16 |
| 188 | 30 | 30.64 | 32.6 | 30.64 |
| 189 | 5.8 | 4.47 | 5.8 | 4.47 |
| 191 | 86 | | 85.9 | 85.9 |
| 215 | 55 | 0 | 34.9 | 0 |
| 216 | 170 | | 195.1 | 170 |
| 217 | 65 | | 88.6 | 65 |
| 219 | 70 | | 123.0 | 70 |
| 220 | 85 | 77.25 | 79.5 | 77.25 |
| 221 | 58 | 49 | 64.1 | 49 |
| John Cox | 955 | 954.9 | 654.9 | 654.9 |
| | | | | 4,695.72 acres |

# APPENDIX "J"
# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,
*Appellant,*

*vs.*

AHTANUM IRRIGATION DISTRICT,
a corporation, et al.,
*Appellees.*

No. 17,997

[Nov. 2, 1964]

## ON PETITION FOR REHEARING

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Before CHAMBERS, POPE and MERRILL Circuit Judges.

In an opinion on an earlier appeal in this case we held that the individual defendants must prove and establish their water rights, and the extent thereof, as of 1908, for the purpose of measuring their rights under a certain 1908 agreement between the United States and the predecessors of these defendants. Upon this second appeal our decision noted that the Master, who heard the case on retrial and whose findings were in general adopted by the court, had misunderstood and misapplied our former directions. We noted, however, that on the basis of certain findings of the Master, and upon the evidence adduced, the true extent of those water rights was apparent since there was no conflict in the evidence

which conclusively disclosed the limited nature thereof. Accordingly we remanded with specific directions as to the modification of the decree.

In a petition for rehearing appellees, after quoting our statement that the evidence "discloses a complete unanimity as to the fact that water was generally not available after the first of July each year," asserted that they should have an opportunity to argue that this conclusion of ours was erroneous, and to have an opportunity to point out the record in detail. They asserted that substantial evidence in the record shows late summer irrigation in and before 1908; that scrutiny of the record would show 58 instances in which witnesses had testified to the raising and production of late water crops, and the use of late water after July 10 in the year 1908 and in the years before. [1]

Considering that if that assertion of appellees was correct we might find it necessary to remand the case for a new trial to determine the extent of those water rights, we entered an order requesting appellee to supplement its petition "by making a detailed reference to and explanation of, the matters alluded to in footnote 1 on page 4 of its Petition. Such supplement may be

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[1] In a footnote appellees said:

"Limitations of space do not permit detailed references to the record at this point. Counsel have examined Volume 21, page 11988 through Volume 27, page 13643, et seq., and the references are located in those pages."

typewritten and its length is not limited. It should be filed within 45 days from this date." Appellant was requested to reply to the petition and such supplement within a further period of 45 days.

The said supplement has been filed as requested, and also the reply thereto. The supplement lists 53 items of evidence stating what purports to be the substance of each. We have gone through each of these items, referring to the appropriate pages of the record. We had previously read all of these portions of the record in arriving at the conclusion stated in our opinion. Our further examination of the record, in the light of the petition for rehearing and the supplement thereto, convinces us that our former conclusion was right.

Accordingly, the petition for a rehearing is denied.

## APPENDIX "K"

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, *Appellant,* vs. AHTANUM IRRIGATION DISTRICT, a corporation, et al., *Appellees.* | No. 17,997 DC No. 312 |

### JUDGEMENT

APPEAL from the United States District Court for the Eastern District of Washington, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Southern Division and was duly submitted.

ON CONSIDERATION WHEROF, It is now here ordered and adjudged by this Court, that this cause be and hereby is remanded to the said District Court with directions to modify the portion of the decree dividing the waters to read as follows:

I

From the beginning of each irrigation season, in the spring of each year, to and including the tenth day of July of each such year, said waters shall be divided as follows:

a. To defendants, for use on their lands north of

Ahtanum Creek, seventy-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations, provided that the total diversion for this purpose shall not exceed 46.96 cubic feet per second, and provided that when the said measured flow exceeds 62.59 cubic feet per second defendants shall have no right to the excess, except in subordination to the higher rights of the plaintiff.

b. To plaintiff, for use on Indian Reservation lands south of Ahtanum Creek, twenty-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations; provided that when that natural flow as so measured exceeds 62.59 cubic feet per second, all the excess over that figure is awarded to plaintiff, to the extent that the said water can be put to a beneficial use.

c. Plaintiff may divert such water from the south fork of Ahtanum Creek as can be beneficially used for the individual diversion into the Yakima Indian Reservation lying above the main Bureau of Indian Affairs diversion; provided, however, that the water diverted to such individual diversion shall be charged against and deducted from the over-all award set forth in "b" above.

d. To the plaintiff, for the low Bureau of Indian Affairs diversion, a daily diversion of water representing five per cent of the natural flow of Ahtanum Creek as measured at the north and south fork gauging stations. This award shall represent plaintiff's interest in the return flow of the main stem of Ahtanum Creek, and the award to defendants shall be conditioned upon plaintiff receiving this flow of water at the lower Bureau of Indian Affairs diversion.

e. To defendants, all the rest of the return flow in

the main stem of Ahtanum Creek, and all the return flow in Hatton and Batchelor Creeks.

f. Any water loss which may occur between the north and south fork gauging stations, and the defendants' Hatton Creek diversion, is to be absorbed by defendants; plaintiff being entitled to its full stated percentage of the measured flow, and defendants taking the balance.

II

After the tenth day of July in each year, all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of Ahtanum Creek, to the extent that the said water can be put to a beneficial use.

The Judgment is ordered modified further by adding thereto the following:

The court reserves jurisdiction to make such further orders as may be necessary to preserve and protect the rights herein declared and established, should a subsequent change in the situation or condition of the parties hereto so require.

Filed and entered 3/18/64
Clerk is directed to enter this
30th day of November, 1964

/s WILLIAM J. LINDBERG
United States District Judge

# In the Supreme Court of the United States

OCTOBER TERM, 1964

---

No. 1026

AHTANUM IRRIGATION DISTRICT, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The first opinion of the court of appeals is reported at 236 F.2d 321 (Pet. App. 25). The second opinion of the court of appeals is reported at 330 F.2d 897 (Pet. App. 190). The opinion denying rehearing is reported at 338 F.2d 307 (Pet. App. 241).

### JURISDICTION

The judgment of the court of appeals was entered March 18, 1964, and a timely petition for rehearing

was denied on November 2, 1964. On February 2, 1965, Mr. Justice Douglas extended the time within which petitioners might file a petition for a writ of certiorari to and including April 1, 1965. The petitioner was filed on March 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a 1908 agreement between the United States on behalf of the Yakima Indians and individual white settlers regarding the use of water from Ahtanum Creek was properly construed by the court of appeals as conferring on the white settlers the right to use only so much of the water (up to 75 percent of its natural flow) as they had put to beneficial use in 1908.

## STATUTES INVOLVED

5 U.S.C. 485 provides:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * *
>
> Indians

25 U.S.C. 2 provides:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

## STATEMENT

In July 1947, the United States filed this suit against petitioners, a group of white settlers who were using the water of Ahtanum Creek, the northern boundary of the Yakima Indian Reservation, to establish the prior rights of the Indians to the waters of the creek under the doctrine of *Winters* v. *United States*, 207 U.S. 564. The primary defense asserted by petitioners was a 1908 agreement between the United States on behalf of the Yakima Indians and the individual settlers (known as the "Code Agreement"), providing that the settlers could use up to 75 percent of the flow under certain conditions. The district court dismissed the action, but the court of appeals reversed. The court of appeals sustained the validity of the Code Agreement but held that it conferred on the white settlers a right to use only such water as they needed in 1908 and continued to use thereafter, the total not to exceed 75 percent of the natural flow of the stream (Pet. App. 69). The court remanded the case to the district court for a trial and findings of fact.

On remand, the district court, affirming the result of a special master's report, held that petitioners were entitled to 75 percent of the total flow of the creek (not allocated parcel by parcel) and that the Indians were entitled to not more than 25 percent of the total flow. The court of appeals reversed. It held that the agreement was not intended to convey to the white settlers any absolute right to 75 percent of the waters, but that the settlers obtained under the

agreement no more water than they could prove had been put to beneficial use by their predecessors at the time of the agreement and had been used continuously since that time on individual parcels. Since petitioners had failed to show that they had, in 1908, used the creek's waters after July 10, the court awarded to the Indians all the creek's water after July 10 each year. The court of appeals also determined the rights of various parcels to water before July 1 on the basis of undisputed evidence in the record.

## ARGUMENT

In two extensive opinions the court of appeals has construed the Code Agreement as granting petitioners rights dependent upon their predecessors' use of the waters of Ahtanum Creek in 1908. This construction does not conflict with any decision of this Court or of any other court of appeals, and it fairly resolves the dispute between petitioners and the Yakima Indians in light of the probable intentions of the parties to the agreement and the language they used in comprising their dispute. Accordingly, there is no reason for further review by this Court.

1. The Code Agreement did not, by its terms, convey any rights to the use of water or otherwise divide up ownership in the creek's flow. The agreement provided only that the United States, on behalf of the Indian tribes, would "limit and define its claim" to 25 percent of the natural flow, and that petitioners' predecessors in interest would likewise "limit and

define [their] total and aggregate claim" to 75 percent of such flow (Pet. App. 18). The court of appeals in its second opinion construed the agreement as applying only to that portion of the year when, in 1908, the creek's waters were actually used by petitioners or their predecessors. It found, on uncontradicted evidence, that the water was used only until the early part of July of each year; consequently, it directed that the judgment in this case award to the Indians all the creek's waters after July 10 (Pet. App. 213-219).

This construction accorded with the probable intentions of the parties to the agreement and with the language they used. Ahtanum Creek's waters were used by the settlers in 1908 only prior to July 10 of each year. Under these circumstances it is highly unlikely that the parties intended the agreement to control the use of water after July 10. Moreover, by casting the agreement in terms of a limitation upon claims rather than as an outright conveyance or allocation of priorities, the parties to the agreement demonstrated that they were considering the assertion of rights then available rather than any subsequent use upon which claims might be made in the future.

2. There is no merit to petitioner's contention that the court of appeals misconstrued the words "natural flow" as used in the agreement (Pet. 19-20). The court of appeals did not base its decision on any limiting interpretation of those words, nor did it in any manner suggest that "natural flow" ceased as of July 10 each year. Rather, the court of appeals con-

strued the agreement as generally inapplicable to uses of the creek at times which could not have been contemplated by the parties. This construction did not require that any unusual meaning be ascribed to the words "natural flow."

3. Nor did the court of appeals improperly reject, as petitioners contend (Pet. 24-26), any findings of fact made by the special master or the district court. The findings to which petitioners refer (Pet. 25) related to "diversion *requirements*" and not actual *use* of the water. The court of appeals observed that the master, on remand, had mistakenly considered petitioners' current need, rather than their predecessors' 1908 use, as dispositive. The finding quoted by petitioners rested upon that mistaken premise. Moreover, the court of appeals did not rest its conclusion on a finding that the creek did not flow after July 10 but on the fact that petitioners or their predecessors made no use of the "diminished" supply available after that date (Pet. App. 210).

4. Whether or not the court of appeals misapplied Washington law in determining the rights of the parties (see Pet. 28-34) obviously presents no question warranting review by this Court. In any event, we submit that the court of appeals properly applied the principle of State law which recognizes that a water right "may be measured by time as well as by volume" (Pet. App. 214). The actual use of the waters of Ahtanum Creek in 1908 did not encompass any diversion of its flow during the dry season of the year by the white settlers. Hence they could not be said to have appropriated the creek's waters for their

own use during those months. Thus, the court of appeals correctly decided that the rights reserved to the Indians by treaty as to that period were not affected by the Code Agreement.

5. Finally, petitioners' assertion that the agricultural community on the north side of Ahtanum Creek will be ruined by the decision of the court of appeals (Pet. 20-24) does not warrant further review of this case. The claim has no merit even assuming that there is some factual basis for the assertion—a premise which we do not concede. Had petitioners prevailed in the court of appeals, the same arguments could have been made by the Indian tribes; inherent in any lawsuit over a limited supply of water is the possibility that the losing party's agricultural enterprises may suffer. Petitioners do not contend that the Indian tribes or the United States actively misrepresented the meaning of the agreement to them or to their predecessors in interest. Whatever land they cultivated on the north side of Ahtanum Creek, therefore, was cultivated on the risk, of which they were well aware, that if their construction of the agreement was judicially rejected the water needed for irrigation might become unavailable.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.*

Respectfully submitted,

ARCHIBALD COX,
*Solicitor General.*

J. EDWARD WILLIAMS,
*Acting Assistant Attorney General.*

ROGER P. MARQUIS,
EDMUND B. CLARK,
*Attorneys.*

MAY 1965

* We have filed a conditional cross-petition for a writ of certiorari, *United States* v. *Ahtanum Irrigation District, et al.*, No. 1035, this Term, which, we submit, should be granted if the present petition is granted.

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No. 3888

# In the Supreme Court of the United States

October Term, 1964

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Ahtanum Irrigation District, a corporation, and The State of Washington, et al,
*Petitioners,*

vs.

United States of America,
*Respondent.*

---

# REPLY BRIEF OF PETITIONERS

---

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

---

**No. 1026**

AHTANUM IRRIGATION DISTRICT, a corporation, and THE STATE OF WASHINGTON, et al,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

---

## REPLY BRIEF OF PETITIONERS

Petitioners wish to reply to the brief of the United States in opposition to petition for writ of certiorari as follows:

---

## COUNTER STATEMENT

The District Court and the Special Master did not award 75% of the total flow of Ahtanum Creek to the petitioners (Resp. Br. p. 3) but only awarded to the petitioners 75% when the measured flow of the creek is 76.3 c.f.s., or less, the maximum being limited to 57.2 c.f.s. All of the flow of the creek above 76.3 c.f.s. was awarded to the United States (Appendix F, p. 178 and G. p. 183).

Petitioners did not fail to show use of the creek's

water after July 10, but, on the contrary, did show such use (Pet., p. 24-28; R. 11988-13643; References are detailed in "Supplement to Petition for rehearing" filed with Court of Appeals; Appendix D, pp. 111-112). The Court of Appeals did not award all of the water in the Creek to the United States after July 10th because of an alleged failure of the petitioners to show use after July 10, but because the Court of Appeals found no water was available for use after this date.

**REPLY TO ARGUMENT OF RESPONDENT**

Petitioners disagree that the Court of Appeals correctly construed the 1908 Agreement, and, on the contrary, contend that such construction conflicts with decisions of this Court, decisions of the Courts of Appeals, and applicable decisions of the Supreme Court of the State of Washington.

Its construction further ignores the obvious intention of the contracting parties.

1. By the 1908 Agreement, the United States divested itself of 75 per cent of the waters of Ahtanum Creek. It not only agreed to "limit and define" its claim to 25 per cent of the natural flow of the creek, but it also "surrendered and conceded" 75 per cent of the natural flow to the north side water users. (Pet. p. 13) The petitioners have always contended and now contend that the 1908 Agreement conveyed waters of the creek to them

(App. H, p. 187). But the important legal effect of the 1908 Agreement is not found in the verbiage used, but in the fact that it accomplished a *permanent* disposition and division of the waters of the creek, and in the fact that it did *not* limit the division and use of the natural flow to any date in the middle of the irrigation season, such as the date of July 10 selected by the Court of Appeals.

The Court of Appeals found, not so much that the waters of the creek were not used by those on the north side after July 10, as that there was *no water available* in the creek after July 10, and that this was the reason for its alleged nonuse. (App. I, pp. 210-214). This, of course, is the basic error which the Court of Appeals has committed and which will produce such disasterous results if its opinion is not reversed. Far from the evidence being uncontradicted as to nonavailability and nonuse of water after July 10, there was substantial evidence that water flows in the creek after July 10 of each year, has continued to flow after July 10 in each year, and has been used by the north side users after July 10 in each year. (R. 314-318; 11988-13643; Supplement to Petition for Rehearing; App. D, p. 111-112). The Special Master and the District Court made findings relating to the existence and continuing use of water by the north side for the entire irrigation season, which were improperly superseded by the Court of Appeals in its opinion. (App. F, p. 169).

The contention of the United States in its brief that

it is unlikely that the parties to the 1908 Agreement intended to control the use of water after July 10 is unsupported by the facts and unsupported by reality. It is a distorted and incredible interpretation of the 1908 Agreement to say that the parties who were to share a diminishing supply of water, which began to make itself felt in July and diminished through July and into August and September, would enter into an agreement which only provided and was intended to provide for a division of waters prior to July 10 and not to apply to the use of the waters after July 10 when they were most needed. The parties certainly did not write any such provision into their agreement, and it would have been easy for them to so do if they had actually had such a peculiar provision in mind.

2. The Court of Appeals did erroneously construe "natural flow" as it clearly found no water available after July 10th in 1908 when it stated as follows:

> " . . . . . This method of farming was largely the result of the fact that by the first of July each year, generally speaking, the supply of water had greatly diminished so that because of the porous condition of the bed of Ahtanum Creek, the water flowing therein sank out of sight. Thus one witness for the defendants who had testified with respect to a number of parcels of land there, one of which he owned in 1908, testified as follows: 'Early in the year, I irrigated, but later in the year I did not because you had no water.' Describing the land he said: 'A. You could raise good crops on it if you had the water. Q. But you did not have water? A. After July. Q. After July what, first? A. The first part of July.' "

(Appendix I, pp. 210-211)

> "An examination of the testimony of the witnesses on whom the defendants relied for proof of their use, or of their predecessor's use, of water for irrigation in 1908, discloses a complete unanimity as to the fact that water for irrigation was generally not available after the first of July each year; . . . . ."

(Appendix I, pp. 213-214)

"Natural flow" means the flow during the entire year, including the summer irrigation season. (Pet. Br. p. 20) There was "natural flow", albeit diminished, during the entire irrigation season. (Pet. Br., pp. 26-27)

The United States asserts the agreement was construed by the Court of Appeals as being applicable in dividing the waters of Ahtanum Creek only during the time of abundant run-off in the spring and early summer. This construction is astounding since it would make simpletons out of the Secretary of Interior, Chief Engineer of the Bureau of Indian Affairs Code, United States District Attorney Avery, acting for the Government, and the pioneer settlers' Committee acting for the north side users. It has these parties, earnestly seeking a solution to this troublesome question, dividing the waters only for that period of time when they did not need to be divided and ignoring the period of short supply when they required division. Obviously the reverse is the true situation. The contracting parties were not concerned with the period of abundant run-off in the spring.

3. The findings of fact by the Special Master and adopted by the United States District Judge Lindberg relating to diversion requirements or duty (Pet. Br., p. 25) were based upon both need and use. This was made crystal clear in Judge Lindberg's Opinion when he stated:

> " . . . . . The nature of the action remained the same and required *a determination of the need and use of Ahtanum waters as well as* the deraignment of title by defendants to the lands to which any *conceded* water rights *secured* under the agreement became appurtenant."

> " . . . . . *The principal issue thus becomes one of determining with reasonable exactness the volume of flow surrendered to the north side users in the aggregate. This determination under the general direction of the Court of Appeals is to be based upon evidence of title, need and use by the north side defendants as of 1908. For this purpose a tract by tract analysis is necessary to ascertain whether the beneficiaries and their successors claiming under the agreement had in fact sufficient ownership, need, and use as to such tracts to justify an award of the full volume of water conceded to them as a group. If proved as of 1908 and later titles are deraigned as well as need and use overall maintained to the extent that the entire 75% of the volume of water is still required that volume should be awarded to defendants collectively under the provisions of the agreement.*"

(Appendix E, pp. 150-152)

The District Judge in his conclusions of law further stated:

> "4. That the plaintiff and the answering defendants have sufficiently deraigned their titles to lands bene-

> fited by the waters of Ahtanum Creek under the provisions of the agreement of 1908. That said parties have sufficiently proved needs as *well as beneficial use* of Ahtanum waters in 1908 and 1957 so that a precise measurement of the natural flow and a percentage division thereof, in the aggregate, of said waters may be made."
>
> (Appendix F, Conclusion of Law 4, p. 177) (Emphasis supplied)

As pointed out, *supra*, the Court of Appeals did rest its finding on an erroneous conclusion that Ahtanum water ceased to flow and hence was not available after July 10th. The District Court found, and the record supports, the availability and use of the water by the petitioners after July -10th.

4. The decision of the Court of Appeals limiting the natural flow of Ahtanum Creek as divided by agreement of the parties to July 10 in each year is contrary to the decisions of the Supreme Court of Washington defining natural flow, which decisions had been rendered prior to 1908 and were in effect at the time the parties entered into the contract. The United States in its brief points to no decision in the State of Washington which would indicate that natural flow does not mean the continuing and uninterrupted flow of the creek without diminution or alteration. The Court of Appeals in its decision did not discuss the decisions of the State of Washington on this point. It is submitted that when a decision of a Court of Appeals is contrary to the law of a State in a situation in

which the State law should be given weight in determining the intention of contracting parties, and when such an erroneous application of that law will result in a manifest injustice to those who entered into the contract (and particularly when the United States is the other party), that there then exists an impelling reason for granting certiorari under the principles established by this Court in its Rule 19.

5. The agricultural economy of the north side of Ahtanum Creek will be ruined by the decision of the Court of Appeals. There can be no successful contention made that the elimination of all irrigation water in the middle of an irrigation season in a dry and arid country will not dry up any crops being raised. Nor can the economy be sustained without domestic and stock water. It makes little difference whether the United States concedes this to be true or not — it is an unfortunate fact.

It is not true that the United States would be in the same position as these petitioners had the opinion of the Court of Appeals upheld the District Court. No one has ever sought to take away any water from the United States to which it was entitled under the 1908 Agreement. It is only the United States which has sought to deprive the petitioners of the waters transferred to their predecessors in interest and to them by the Agreement.

Neither did the petitioners or those who were parties

to the 1908 Agreement continue to farm through all of these years with an awareness that "if their construction of the Agreement was judicially rejected" that they might be without water. The construction of this Agreement adopted by the Court of Appeals never saw the light of day until that decision was handed down in 1964. No party to the Agreement, to any subsequent controversy, nor to this litigation ever contemplated that the agreement was intended to apply only until July 10th in each year, and that thereafter all of the water flowing in the creek would be transferred to the United States. It is true that at the time this litigation was commenced by the United States in 1947, the petitioners were threatened with the contention that the 1908 Agreement was invalid and that all of their water might be taken from them. But this contention was disposed of in 1956 by the Court of Appeals when it held the 1908 Agreement to be a valid exercise of authority by the Secretary of the Interior. There may have been controversy over the years about what percentages of water each side would receive for the entire irrigation season, but there certainly has never been any threat or risk that the diminished flow of irrigation water available in the middle of the irrigation season would be cut off entirely from one side and transferred to the other side.

## CONCLUSION

For all the reasons advanced in the petition for certiorari and advanced herein, we respectfully submit that this is a proper case in which certiorari should issue to review the decision below.

Respectfully submitted,

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MAY 14, 1965.